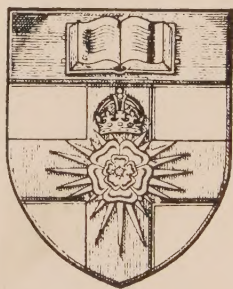


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THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1918.

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CORRIGENDA.

Page 23, *add to* sect. 140—

“ And the grand jury or grand juries of the said other neighbouring county or counties respectively shall, and they are hereby required, on the production of the certificate of such judge declaring the proportion to be paid by such county or counties, to present such proportion when the same shall exceed £100 to be raised off the county at large, and if such proportion shall be under £100 to be raised off the barony or baronies in or near to which such injury shall be alleged to be committed, and paid to the person or persons so applying, as the case may require”.

Page 36, line 1, *for* “automatic” *read* “autocratic”.

„ 92, *for* “plaintiff”, line 5 from bottom, *read* “will”.

„ 93, *for* “plaintiff”, line 4 from bottom, *read* “will”.

„ 221, line 24, *for* “Wills J.” *read* “Willes J”.

„ 491, references at bottom, *for* “(7) (8) (9) (1)” *read* “(1) (2) (3) (4)”

MEMORANDA.

The HON. DUNBAR PLUNKET BARTON having resigned, the RIGHT HON. JAMES O'CONNOR was, on 23rd April, 1918, appointed a Judge of the Chancery Division in Ireland.

On 23rd April, 1918, ARTHUR WARREN SAMUELS K.C. was appointed His Majesty's Attorney-General for Ireland.

On 23rd April, 1918, JOHN BLAKE POWELL K.C. was appointed His Majesty's Solicitor-General for Ireland.

On 8th June, 1918, the RIGHT HON. SIR IGNATIUS JOHN O'BRIEN having relinquished the Great Seal, the RIGHT HON. SIR JAMES HENRY MUSSEN CAMPBELL, BARONET, Lord Chief Justice, was appointed Lord High Chancellor of Ireland.

On 19th August, 1918, the RIGHT HON. THOMAS FRANCIS MOLONY, Lord Justice of Appeal, was appointed Lord Chief Justice of Ireland.

On 21st August, 1918, the RIGHT HON. MR. JUSTICE JAMES O'CONNOR was appointed a Lord Justice of Appeal in Ireland.

On 2nd December, 1918, DENIS STANISLAUS HENRY K.C. was appointed His Majesty's Solicitor-General for Ireland.

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C A S E S

DETERMINED BY¹

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1918.

CALLINAN *v.* McMAHON (1).

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Land Purchase Acts—Privilege—Easement—Prescription—Land Law
(Ireland) Act, 1896, sect. 34, sub-s. 1.

June 25, 26,

A privilege cannot become an easement under sect. 34, sub-s. 1, of the Land Law (Ireland) Act, 1896, unless it has been enjoyed for such a time that (apart from its having been enjoyed by consent of the landlord) it would have become a valid easement.

(*Per* Kenny and Gordon JJ., Gibson J. *diss.*), such enjoyment must throughout the whole period have been upon the particular holding in respect of which it is claimed.

Semble (*per* Kenny J.): An ambulatory privilege given by the lessor is not within the section.

King-Harman's Estate, (1908) 1 I. R. 202, considered.

CASE STATED by Pim J. at the Ennis Spring Assizes, 1917, on appeal from the County Court Judge.

The following facts were proved or admitted:—

1. At and prior to the dates of the agreements hereinafter mentioned the plaintiff and the defendant were both tenants on

(1) Before GIBSON, KENNY, and GORDON JJ.

K. B. Div. the Burton estate. The holding of the plaintiff was situate in the
1917. townland of Aughyarna, and that of the defendant in the town-
CALLINAN land of Gower South, both in the Barony of Moyarta, and County
v. of Clare. In the year 1905 the landlord entered into agreements
McMAHON. with his tenants for the sale to them of this estate under the
provisions of the Irish Land Act, 1903. By an agreement, dated
the 27th day of September, 1905, made between William
Cunningham Vandeleur Burton and the plaintiff, and by agree-
ment dated the 25th day of September, 1905, between the said
William Cunningham Vandeleur Burton and the defendant, the
plaintiff and the defendant respectively agreed to purchase their re-
spective holdings under the provisions of the said Acts. By a
further agreement made subsequently the defendant agreed to
purchase from the landlord, in accordance with the provisions of
the said Acts, an additional parcel of the land on what was known
as the Northern Bog, in said townland of Aughyarna, containing
about 1A. 0R. 14P. statute measure. As appears by endorsement,
dated 23rd October, 1912, on the said agreement the defendant
agreed that the said additional parcel of land should be consolidated
with the holding already agreed to be purchased by him as aforesaid.
A large number of the tenants were granted similar plots of
turbary on the same bog by similar agreements. Copies of the
said purchase agreements are incorporated and annexed to this
case. By fiat of the Irish Land Commission, the holding so
agreed to be purchased by the plaintiff was vested in the plaintiff,
and the plaintiff was duly registered as owner thereof in accordance
with the provisions of the Local Registration of Title (Ireland)
Act, 1891, and is now the registered owner of the lands comprised
in folio No. 4610 of the Register, County of Clare. There is no
reservation either in said purchase agreement or on the folio of
any right of turbary either in favour of the defendant or of any
other person. By fiat of the Irish Land Commission, dated the
28th day of November, 1912, the holding agreed to be purchased
by the defendant was vested in him, and the defendant was duly
registered as owner thereof in accordance with the provisions of
the Local Registration of Title (Ireland) Act, 1891, and he is now
the registered owner of the lands comprised in folio No. 4581 of
the Register, County of Clare. Copies of the said folios are
incorporated with and annexed to this case.

2. On the Burton estate, and forming portion thereof, there was a tract of bog which extended over portion of the holdings of three tenants, namely, over the holdings of the plaintiff, of a Mrs. Callinan, and of a William Carey. This tract of bog was known as and called the Southern Bog. The landlord retained control over this bog, and exercised the exclusive right of putting any of his tenants from time to time to cut turf thereon without payment of rent of any kind.

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3. The defendant's father and the defendant himself for upwards of forty years have cut turf on this bog where pointed out by the landlord, the particular turf bank on which they worked being until about fourteen years ago on that portion of the bog which lay within the ambit of Mrs. Callinan's holding. About fourteen years ago the said bank on Mrs. Callinan's holding became exhausted. The landlord's bog-ranger then pointed out to the defendant a new bank on which he was to cut his turf. This new bank was situate within the ambit of the holding occupied by the plaintiff, which was subsequently purchased and vested in him under the Irish Land Act, 1903. The defendant continued to cut turf since that date without interruption until two years ago, when he was stopped by the plaintiff. The present proceedings arise out of said interference.

4. Cullinan, on behalf of the plaintiff, contended that, inasmuch as the plaintiff and the defendant are now the registered owners of their holdings, and as both their folios and their purchase agreements are silent as to any rights of turbary on the plaintiff's holding, and as the defendant has only been cutting on the turf bank within the ambit of the plaintiff's holding for a period of fourteen years, the defendant has no right either under the Land Acts or by prescription to cut turf on the plaintiff's holding. Fleming K.C. and Costello, on behalf of the defendant, contended, on the other hand, that as the defendant and his predecessors in title had been cutting turf on the Southern Bog with the permission of the landlord, and without the payment of any rent, for forty years, the case fell within sect. 34, sub-s. 1, of the Land Law (Ireland) Act, 1896; that the said bog should be regarded as an entity apart from the holdings over which it extended; that it made no difference to the defendant's rights that the banks on

K. B. Div. 1917. which he had been cutting were on different holdings; and that, accordingly, he has the right as against the plaintiff's holding to continue cutting turf thereon. He referred to *Coote v. Phelan* (1), *CALLINAN v. McMAHON. King-Harman's Estate* (2), and *Scott's Estate* (3). I decided in favour of the plaintiff, and affirmed the decree of the County Court Judge.

Fleming K.C., on behalf of the defendant, then asked me to state a case, and, as the question is one of general importance and affects a considerable number of tenants in the district, I agreed to do so.

The question for the decision of the Court is:—

1. Whether, notwithstanding the fact that the purchase agreements and the folios both of the plaintiff and of the defendant are silent as to the existence of any right of turbary in favour of the defendant over the plaintiff's holding, and the fact that the defendant has been cutting on the particular turf bank within the plaintiff's holding for a period of not more than fourteen years, the defendant is still entitled to a right of turbary over the plaintiff's holding by virtue of sect. 34 of the Land Law (Ireland) Act, 1896, on the ground that the bog called the Southern Bog is to be regarded as an entity apart from the holdings over which it extends; and that the defendant and his predecessors in title have been cutting on said bog long enough to give a third person a right to the profit à prendre?

2. If this question be answered in the affirmative, the decree of the County Court Judge should be reversed, and the civil bill dismissed with costs, together with witnesses' expenses measured at £4 4s.

3. If this question be answered in the negative, the decree of the County Court Judge should be affirmed with costs, together with witnesses' expenses measured at £4 4s.

P. D. Fleming K.C., Clery, and Costello, for the defendants:—

The bog in question was the landlord's bog. It extended over the holdings of three of the tenants, including the plaintiff's. This bog must be regarded as an entity, and it was in respect of

(1) 35 I. L. T. R. 196.

(2) [1908] 1 I. R. 202.

(3) [1916] 1 I. R. 180.

it that the privilege was in fact enjoyed by the defendant of cutting turf for the use of his holding. He himself and his father for upwards of forty years were cutting turf on this bog by the landlord's permission free of rent, up to fourteen years ago on Mrs. Callinan's holding, and since on the plaintiff's holding, as pointed out to him fourteen years ago by the landlord's bailiff. This was a "privilege" within the meaning of sect. 34 (1) of the Land Act of 1896, which was converted into a right by virtue of that section. The fact that upon the sale of the estate the bog in question was parcelled out amongst the three tenants did not affect the defendant's right. If that portion of the bog had continued in the landlord's hands, the defendant's right would be unquestionable. The plaintiff purchased his portion with knowledge of the defendant's right as against the bog, and must be taken to have purchased his holding subject to that right as against that parcel of the bog within the ambit of his holding. The tenant's right as against the landlord would not be confined to any portion of the bog: *Hargrove v. Congleton* (1).

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[Gibson J.: Then the whole bog was given to the tenant.]

In this present case the practice existed of the landlord pointing out to the tenant the places in the bog where the tenant should cut the turf, but this only modified the manner of enjoying the privilege of turbary with a view to preventing wasteful cutting of the bog: *Duggan v. Carey* (2).

[Gibson J.: Logically, you must say you can cut anywhere.]

We are not driven to that in this case. A reasonable practice existed of showing where and how the turf should be taken, and the defendant was in fact cutting and exercising his privilege in that part of the bog within the plaintiff's holding for fourteen years at the time of the sale. Moreover, as this privilege was always enjoyed by the defendant, on the sale it became a portion of the contents of his holding under section 34: *Cleary v. Byrne* (3). We have thirty years' user of the bog as an entity. See per FitzGibbon L.J. *King-Harman's Estate* (4).

(1) 12 Ir. C. L. 362.

(2) 8 Ir. C. L. 210, at p. 216.

(3) I. R. 11 C. L. 355.

(4) [1908] 1 I. R. 202, at p. 209.

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H. D. Conner K.C., and *Cullinan*, for the plaintiffs:—

It was never intended that an ambulatory right should exist. If there is no ambulatory right, there is no right at all. The section is entirely conversant with holdings. It refers both to dominant and servient holdings, to one as much as to the other. The enjoyment or subjection, as the case may be, must be one in respect of the holding concerned. It is admitted that in this case the enjoyment was only for fourteen years, and any leave previously given by the landlord to cut somewhere else is absolutely irrelevant to this case. The intention of the Act was to prevent a co-tenant raising the defence that both parties were tenants of the same landlord. One cannot say what the defendant's rights are until the plaintiff's rights have been ascertained. The soil is vested in the plaintiff by the vesting order. The privilege must be the privilege enjoyed up to the date of the vesting order, and the rights are stereotyped by the vesting order.

Cur. adv. vult.

Oct. 30.

GORDON J. :—

This was a case stated by Mr. Justice Pim on a civil bill appeal, heard by him at the last Spring Assizes for the county of Clare. The civil bill was brought for damages for trespass by the defendant in entering upon and cutting turf on the plaintiff's holding. The facts stated are, shortly, that the plaintiff and defendant, respectively, were tenants of agricultural holdings on the estate of a Mr. Burton. In September, 1905, Mr. Burton entered into agreements with the plaintiff and defendant for the sale to them of their respective holdings under the provisions of the Irish Land Act of 1903. These holdings were subsequently vested in the plaintiff and defendant, respectively, by flats of the Irish Land Commission, dated in 1912, and they were registered as the owners thereof under the Local Registration of Title (Ireland) Act, 1891. There is no reservation either in the purchase agreement or in the registration of any right of turbary to the defendant or to any other person. The defendant also agreed to purchase from Mr. Burton a separate portion of bog which was consolidated with his holding. On the Burton estate, and forming portion thereof, there was a tract of bog which extended

over portion of the holdings of three tenants, namely, over the holdings of the plaintiff, of a Mrs. Callinan, and of William Carey. The landlord retained control over this bog, and exercised the exclusive right of putting any of his tenants from time to time to cut turf thereon without payment of rent of any kind. The defendant's father and defendant himself for upwards of forty years had cut turf on this bog where pointed out by the landlord, the particular turf bank on which they worked being, until about fourteen years ago, on that portion of the bog which lay within the ambit of Mrs. Callinan's holding. About fourteen years ago the bank on Mrs. Callinan's holding became exhausted, and the landlord's bog ranger then pointed out to the defendant a new bank on which he was to cut his turf. This new bank was situate within the ambit of the holding occupied by the plaintiff, which was subsequently purchased and vested in him under the Irish Land Act of 1903. The defendant continued to cut turf on this bank since that date without interruption, until about two years ago, when he was stopped by the plaintiff. It was for cutting on this bank that the present proceedings were instituted. The County Court Judge gave a decree in favour of the plaintiff. Mr. Justice Pim would have affirmed this decree, but at the request of the defendant's counsel he stated this case. The question for our decision is whether upon these facts, and having regard to the existing state of the law, the defendant had a right to enter upon plaintiff's farm and cut turf upon the bank. Upon the facts, and apart from legislation, no such right would exist. No doubt, before the sale and vesting of the holdings, the landlord had exercised the right to permit the defendant to go upon these lands and take the turbary of which he was the owner; and so long as the relation of landlord and tenant existed there was nothing in law to prevent the holding consisting of the land minus the turbary, and if this was the position, even the fixing of a fair rent would not transfer the turbary to the tenant, as was decided in *Knox v. Baxter* (1). But upon the sale of the holding to the plaintiff, and the vesting of it in him, no ownership of or right to the turbary was reserved to or remained in the landlord. We have not to deal with the questions arising under sect. 21 of

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K. B. Div. the Land Act of 1903, which were the subject of the decisions in 1917. *King-Harman's Estate* (1) and *Scott's Estate* (2), though sect. 34 of the Act of 1896, with which we are concerned in the present case, was discussed, and opinions expressed as to its effect in the former of these cases.

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So far as I can see, therefore, the defendant can only rely on sect. 34, sub-s. 1, of the Land Act, 1896, as giving him a right to go upon the plaintiff's holding for the purpose of taking turbary, and it is upon the provisions of this sub-sect. that he does rely. [His lordship read the section.] The first part of this sub-sect. only deals with easements, rights, and appurtenances which have a legal existence at the date of the vesting, and does not apply to the present case. If the turbary had remained in or was reserved to the landlord, in my opinion the defendant would, under the second part of the sub-sect., as against him have been entitled to get turf upon some part of the area of the bog in the three holdings so reserved. He and his predecessors had for forty years enjoyed the privilege of cutting turf on such part of this area as the landlord pointed out to him. The time was sufficient, and so also was the manner of enjoyment, as the power of pointing out on the bog the place where, and the manner in which, turf should be cut, would only modify the manner of enjoying a right of turbary (see *Duggan v. Carey* (3)). But the question here is not between the landlord and the defendant. The question arises between the defendant and the plaintiff, who is now the owner not only of the farm, but of the turbary comprised in it.

Before the vesting the only privilege which the defendant had was to cut turf on such part of the bog in such part of the three holdings—of which plaintiff's was one—as should be pointed out to him by the landlord. The privilege was not to take the plaintiff's turbary, but to take the turbary which belonged to the landlord; and, so far as the plaintiff's holding was concerned, the only privilege defendant enjoyed was to go over it, and take this turbary when permitted or directed by the landlord so to do. As a matter of fact, the defendant had been allowed by the landlord

(1) [1908] 1 I. R. 202.

(2) [1916] 1 I. R. 180.

(3) 8 Ir. C. L. 210, at p. 216. [And see *FitzPatrick v. Verschoyle*, [1913] 1 Ir. R. 8.—Ed.]

to take turbary on the plaintiff's holding for about fourteen years before the vesting of the holding in the plaintiff. This was not such a length of time as, if the holding had belonged to a different owner from the rest of the estate, would have created an easement or right; and if the right contended for by the defendant exists it would equally exist if the defendant had only had permission as against the plaintiff for one year before the vesting; and I presume the other two holdings, which were equally liable to have permission given by the landlord to go over them and take turf, would cease to be so liable, and the entire burden would be fixed upon the plaintiff, owing to the mere fact that at the time of the vesting the permission only existed in respect of his farm.

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Under this sub-section the position of the tenant who has purchased, and whose holding is sought to be made liable to easements or rights, must be considered as well as that of the purchasing tenant, who claims these rights. The section was not intended to fix purchasing tenants with new burdens, which either did not exist in point of law at the date of the vesting, or were not privileges previously in point of fact enjoyed as against them, in such a manner or for such a time, that if the holding had belonged to a different owner from the rest of the estate they would have been burdens recognized by law. Lord Justice Holmes, in *King-Harman's Estate* (1), says that the meaning of sect. 34 is clear. It was intended to include privileges—not strictly rights—which would have been rights but for the effect of the decision in *Bright v. Walker* (2). I am, therefore, of opinion that the first question in the case stated must be answered in the negative, and that the decree of the County Court Judge should be affirmed.

KENNY J. :—

The plaintiff's action is one for recovery of damages for the defendant's trespass on the plaintiff's bog. The defendant relies on the 34th section of the Irish Land Act of 1896 as a justification of his acts, and the question for determination is whether, in the circumstances set forth in the case stated, the section

(1) [1908] 1 I. R. 202.

(2) 1 C. M. & B. 211.

K. B. Div. affords a defence to the action. The case is an important one,
1917. as in no reported authority that I can find has there been an
CALLINAN exhaustive consideration of the objects and effects of the section,
v. notwithstanding that it is so frequently the subject of controversy
McMAHON. at sessions and in civil-bill appeals.
Kenny J.

The section deals with easements and rights to which a holding, after it has been vested in a purchaser by a vesting order under the Act, is to be thenceforth subject, and also with easements and rights appurtenant to the holding and exercisable in connexion with it. It provides for two classes of rights and appurtenances, namely, those that were in actual legal existence previously to the vesting order, and certain others which, prior to the vesting order, had been in the category of mere "privileges," without legal status. There is no difficulty in defining the characteristics of the former class. They must have been, before the vesting, legal, enforceable rights or appurtenances, and, whether they were reserved or not by the vesting order, it seems to me that the section recognizes their continued existence and saves such of them as were not reserved by the order from the extinction that might have resulted from their omission.

The controversy, however, in the present case is, I think I may say, mainly, if not altogether, conversant with these pre-existing "privileges" which by the section are clothed with a legal enforceable status. For, although it was, no doubt, claimed in the course of the argument that the defendant could have enforced his turbary privileges as against the landlord before the vesting order, the contention on the point was not seriously pressed, and I think I am justified in treating the argument as being really directed to what I may call the "privilege" portion of the 34th section. I do not see how it could be otherwise, as it is plain that, no matter for what period or in what manner the turbary had been actually taken in the landlord's time, the taking was from the landlord's bog and by his permission, and could not therefore have been as "of right." It remains to consider whether in the circumstances of the case the defendant had at the date of the vesting order such a turbary privilege as is contemplated by the section.

The privileges which the section converts into rights in favour

of the dominant tenement—in this case the defendant's holding—are—(1) privileges previously in fact enjoyed in connexion with the holding, whether by permission of the landlord or otherwise—whatever these last two words may mean; (2) privileges, the enjoyment of which by the owner of the dominant tenement was for a period of time that would be necessary for the creation of a legal easement or right; and (3) privileges, the enjoyment of which by the owner of the dominant tenement was in the manner that was essential to the creation of a legal right in all its features except “permission.” If the enjoyment of the privilege fulfils these several conditions, it becomes an easement or right appurtenant to the holding. The section is loosely drawn, for, dealing as this portion of it does with the dominant tenement and its easements and rights, and not with the obligations or liabilities to which it may be subject, it speaks of those easements and rights as appurtenant to or “exercisable over the holding, as the case may be”—a description that is wholly inappropriate to the dominant holding, with which alone this part of the section is conversant. Apart from this criticism, the language of the section shows very clearly that, as to “time” and “manner,” the enjoyment of the privilege in order to come within the section must have been such that if the holding “had belonged to a different owner from the rest of the estate” the privilege would have been an enforceable easement or right. Now, what is the character of the alleged privilege in this case, bearing in mind that the tests to be applied are those which are common to the acquisition of all easements and rights, with the exception of the vital element of “permission”? The “case stated” finds that the landlord retained control over the tract of bog known as the “Southern Bog,” and “exercised the exclusive right of putting any of his tenants from time to time to cut turf thereon without payment of rent of any kind.” Needless to say, he could, as exclusive owner of the bog, have exacted a rent from his tenants or from other parties for this turbary,—in which case bog tickets or licenses would probably have been annually issued just as they were in respect of the turbary in *King-Harman's Estate* (1). This apparently he did not do,

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but permitted his tenants, including the plaintiff and his father, without any written licence and without any special payment, to take turf from his bog,—and it is found by the case that the defendant's father and he himself for a period covering over forty years have been cutting turf on this bog where pointed out by the landlord. The portion or bank where the defendant had been cutting having become exhausted about fourteen years ago, the landlord's bog-ranger pointed out another portion or bank, and on this bank the defendant has been cutting without interruption down to about two years ago, when he was stopped by the plaintiff, of whose holding this bank of turf formed part, and who had purchased his holding contemporaneously with the purchase by the defendant of his. Consequently for the purposes of this case it must be taken that there has been for fourteen years an uninterrupted user by the defendant of this portion of the bog and a like user by occupiers of his holding of another portion of the bog for at least twenty-six years before the latter became exhausted. The defendant's claim is now confined to the bank on plaintiff's holding, and his contention is that his privilege—he cannot for the purpose of this argument call it a right—was one extending over the bog as a whole, and that he is entitled to rely upon the two periods of user and thus establish a period of at least thirty years' enjoyment, which would be necessary for the creation of a legal right of profit à prendre. I cannot agree that the defendant's privilege was one to take turf generally from the bog as a whole. At the very most it was a privilege to take turf from such part of the bog as should be pointed out, and from no other part, and the landlord had an absolute right to transfer him whenever he, the landlord, desired to some other bank of turf, or he could have stopped him from taking turf from any part of the bog. Supposing that the defendant's holding had, in the words of the 34th sect., belonged to a different owner from the rest of the estate—that is, supposing defendant's holding was an adjoining holding in no way connected with the Burton estate, and its owner without permission had been taking turbary from a particular part of the Burton estate bog—could it be contended that the enjoyment of such a user for any term of years less than thirty could support a claim under the Prescription Act to a legal

profit à prendre, or that such claim could have a more extended operation than as against the particular part of the bog where the cutting had been taking place? In my opinion the right in such a case should be regarded as one confined to the particular bank, and if that bank became exhausted, I see nothing in the facts of this case to suggest that with such exhaustion the right or privilege would not necessarily also determine. Defendant's counsel in the course of the argument admitted that logically he was bound to contend that his alleged right or privilege extended over the whole bog. As I have already said, I cannot hold that his permissive enjoyment was of such a wide-reaching character. As against the portion of the bog where the cutting proceeded up to about 1903, and which became exhausted, there was not sufficient enjoyment within the Prescription Act, and as to the bank on plaintiff's holding, which is the subject-matter of this case, there has been admittedly only a fourteen-years enjoyment. I am of opinion that the defendant is not entitled to add the two periods together for the purpose of making out a thirty-years user.

But it seems to me that this question as to the incidents of a permissive enjoyment within the 34th sect. has been the subject of decision by the Court of Appeal in *King-Harman's Estate* (1). Two questions were determined in that case, one as to the application of the 34th sect., and the other as to the construction and effect of the 21st sect. of the Irish Land Act of 1903. The Court held that the 21st sect. of the 1903 Act was not applicable, but in 1916 the Court of Appeal, differently constituted, reconsidered its decision as to the Act of 1903, and came to the conclusion that its previous judgment was erroneous, but the Court left untouched its decision on the 34th sect. of the Act of 1896 (*Scott's Estate* (2)). If the facts of the present case are in substance indistinguishable from those in *King-Harman's Estate* (1)—as in my opinion they are—then the question now raised is concluded. It, therefore, becomes necessary to inquire whether the circumstances of these cases are in substance the same. In *King-Harman's Estate* (1) the position of holdings on the estate with reference to turbary was stated in Mr. Justice

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(2) [1916] 1 I. R. 180.

K. B. Div. Wylie's memorandum for the Court of Appeal (1) as follows :—
 1917. "Several holdings on the estate contain large areas of bog. The
 CALLINAN practice on the estate with reference to the bog before the date of
 v. the said purchase, was that, though the bog was included in the
 McMAHON. ambit of the holding, the landlord had the right to put in other
 Kenny J. persons to cut turf on same, on payment of a bog rent to the
 landlord, the tenant having the right of turbary for his own use
 only." And the question for determination was whether the
 Estates Commissioners were empowered by the 21st sect. of the
 Act of 1903 to make regulations authorizing the cutting of turf
 by adjoining occupiers where the holding on which was the
 turbary had been vested in the tenant by a vesting order in which
 no reservation of any turbary right was contained. The Court
 of Appeal held that regulations could not be made after vesting
 when no turbary rights were specifically reserved and none
 existed under the 34th sect. It, therefore, became necessary to
 ascertain whether in the circumstances of that case rights under
 the 34th sect. had arisen. The tenant purchaser and certain
 adjoining occupiers were represented in the argument, when the
 Court, consisting of the Lord Chancellor (Sir S. Walker) and
 FitzGibbon and Holmes L.JJ., held in the clearest manner
 that no turbary rights had arisen from the exercise of the privilege
 relied on.

The question of time was not discussed, but the nature and
 characteristics of the privilege were. The Lord Chancellor, at
 p. 208, said it was plain that the person getting a bog-ticket
 "had not an easement or right within the meaning of the 34th
 section. It had none of the characteristics of a right or ease-
 ment. The memorandum does not find any privilege within
 sect. 34, and this branch of the section seems to be pointed to the
 doctrine of *Bright v. Walker*" (2). FitzGibbon L.J. is to much
 the same effect. At p. 210 he says:—"It was within the land-
 lord's discretion to give bog-tickets or not, and to charge what he
 pleased for them. No right or privilege could be acquired by
 any tenant under that course of dealing beyond what each 'ticket'
 gave him, and no ticket was outstanding when the sale to Acheson
 was completed." Holmes L.J. also concurred in thinking that

(1) [1908] 1 I. R., at p. 203.

(2) 1 C. M. & R. 211.

sect. 34 did not apply, and in the course of the argument, at p. 206, he says:—"The meaning of sect. 34 is clear. It was intended to include privileges—not strictly rights—which would have been rights but for the effect of the decision in *Bright v. Walker* (1). The conclusions thus expressed by the members of that Court were not mere obiter dicta, but were declarations essential for their decision on the Act of 1903. This is pointed out in *Scott's Estate* (2). Are the circumstances of the defendant's holding in the case before us so essentially different from those in *King-Harman's Estate* (3) as to call for a decision in the opposite direction? The contention in the latter was between the purchasing tenant and adjoining tenants. So it is here. There and here the landlord's right to put in other persons to cut turf was clear. There the landlord exacted a bog-rent from the adjoining tenants. Here he exacted no bog-rent, and the tenants took the turf without any additional payment to that which represented their rents. I fail altogether to see how that makes a substantial difference in the construction of the section. Is the latter to depend on the periodical issue of bog-tickets, so that an adjoining tenant, who never paid anything additional for his turf, and received no bog-ticket, is to be in a better position than the tenant who did? In my opinion that could not have been, and is not, the meaning of the section when applied to a case like the present.

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Kenny J.

I think the first question put to us in the case stated should be answered in the negative. At the same time I am glad to think that if the defendant is in need of turf the decision of the Court of Appeal on the 21st section of the Act of 1903 may possibly enable him to obtain a supply.

GIBSON J. :—

The question discussed before us is the construction and application of sect. 34 of the Act of 1896, which, according to the defendant, converts the previous user permitted by the landlord in respect of his turbary estate into a right attaching to the plaintiff's holding; while the plaintiff contends that the period

(1) 1 C. M. & R. 211.

(2) [1916] 1 I. R. 180.

(3) [1908] 1 I. R. 202.

K. B. Div. of cutting on his holding being short of the prescriptive period,
 1917. the section confers no such right.

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Gibson J.

It must be taken—and indeed this was not questioned in argument—that before the sale the landlord was entitled to absolute dominion over the South Bog, though included in the tenants' holdings: *Knox v. Baxter* (1); and though such holdings were not subject to judicial tenancies, and were not within sect. 5, sub-s. 5, of the Statute of 1881, c. 49. On purchase from the landlord, the purchasing tenant acquired an estate free from any previous permissive privilege allowed by the landlord as owner, save so far as the same may come within sect. 34. It was not disputed that if the defendant had been cutting turf for the prescriptive period on plaintiff's holding by licence he would have enjoyed the right given by sect. 34, and that the non-mention of such right on the register could not affect the result.

The case states that the defendant bought a small part of the northern bog, and that such portion was consolidated with his original holding on October 23rd, 1912. It does not appear that there was any available turbary on the part so added, or that there was any bargain releasing the right (if any) acquired over the south bog. No argument was attempted that such purchase or consolidation could prejudice the defendant, if he was otherwise entitled to claim the benefit of section 34. The controversy was confined at the bar to the effect of that enactment, the difficulty of construing which has been caused by the compression of the drafting, which deals with dominant and servient interests together.

When the attention of the Legislature was directed to the problem in 1896, turbary enjoyed by tenants represented many different types, some as of right (as to which no question arises); others existing in fact but without legal titles—(1) turbary under legal title, whether contractual or by prescription; (2) turbary by permission in respect of landlord's bog in his own power; (3) turbary by like permission in respect of holdings let to tenants, of which turbary the landlord was owner by way of reservation or exception, as in *Knox v. Baxter* (1); (4) turbary rights of the landlord in respect of judicial tenancies under the statute, 1881,

c. 49, section 5, sub-sect. 5; (5) turbary on an estate on which some of the holdings were not purchased.

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In addition to preserving existing rights proper (with which we are not here concerned) section 34 converts privileges, theretofore in fact enjoyed by permission of the landlord or otherwise, into legal rights. The principle of the section is much the same as that of sect. 3 of the Prescription Act (the subject of many decisions) under which the enjoyment of light for the prescribed period, though not as of right, creates a valid negative easement. The application of *Gayford v. Moffatt* (1) is excluded. What creates the right is the landlord's action continued for the prescribed period; it is the estate at the moment of sale which is affected. It is the landlord's permission which is transmuted and crystallized. Whether such permission during the prescribed period was always exercised on the same plot of bog would seem immaterial. On many, if not most, estates bog-tickets, whether annual or otherwise, were issued, and tenants were frequently moved about, whether because existing banks were exhausted, or for some other reason. The landlord was free to do what he would with his turbary. The tenant over whose holding the permission was given could not claim to give consent or to withhold consent. It would go far to frustrate the beneficial operation of the enactment if its application depended on the accidental circumstance of the cutting having been continued on the same particular spot. The right created grows out of continuance of permission from time to time renewed, as binding the landlord's estate, the subject of sale.

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The argument on behalf of the plaintiff is two-fold: (1) that, as between purchasing tenants, there was no burthen attached to the holding alleged to be servient unless there was the prescriptive period of continuous user on that holding in favour of the dominant tenant who was relying on the landlord's licence; (2) that, on the defendant's argument, he would be at liberty to go to any part of the South Bog to cut when his existing bank was exhausted, though the landlord's control as to defining place and boundaries had ceased to exist; and (it was urged) he might even

(1) L. R. 4 Ch. 133.

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The second point is of more difficulty. Before sale the landlord's permission involved not only the power of revocation, but the power of defining locality on the bog and the area of cutting. On sale, this no longer was possible in reference to the newly created statutory right substituted for the permission. Three constructions of the section may be suggested. The first is that the area on which at the time of sale the permission, renewed in respect of the entire estate for forty years, was actually in force was stereotyped and could not be extended to another holding, notwithstanding that turbary in the original holding was exhausted. The second is that the purchasing tenant could select any part of the South Bog at his pleasure, the landlord's control being no longer exercisable—an inconvenient and improbable view. The third, the one adopted by the plaintiff, is that the permission must have been given and exercised over turbary in the same holding continuously for the prescriptive period of years preceding sale. This interpretation would nullify the section in many, if not most, cases, the landlord appointing from time to time different banks, by bog-ticket or otherwise. The landlord's authority was over his bog estate as one integer, whether demised as in *Knox v. Baxter* (1) or not; and it was his action in giving continuous permission which fixes the right. During forty years a tenant might have been authorized to cut turf in several banks successively on different holdings for periods of a few years at a time, less than twenty years each. Does the accidental circumstance that the permission actually in force at the time of sale was exercised for only fourteen years on a particular spot exclude the statutory right arising from the landlord's previous action in dealing with what was his own property? The plaintiff

bought with the knowledge that the landlord as owner had lawfully authorized the defendant to get turf on his holding, and he took subject to the permission transmuted into a lawful title. It may be that the state of things existing at the date of sale may limit defendant's statutory right, so that, when his bank is cut out, he cannot resort to other parts of the South Bog in other purchased holdings. It would be premature now to pronounce an opinion on that prospective contingency, though my present impression would be adverse to any such claim. While, however, the present bank is available, I do not think the defendant could go into other south-bog holdings for turf, as such proceeding would be altogether contrary to the permission in operation at the time of purchase.

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The section from its concise drafting is not easy to construe, and Parliament may not have considered the present situation, where a conflict between purchasing tenants has arisen. On the whole, I have come to the conclusion that the defendant is within sect. 34, and is entitled to the right of turbary claimed. From the judgments which have been read, I would gather that my brother Gordon holds that permission for the prescribed period exercised on plaintiff's holding would have given the right. My brother Kenny thinks that no permission, even for forty years continuously exercised in the same area such as described, would ever have conferred a right, and that the case he cites so decides. I cannot regard it as ruling any such extensive proposition. A licence like a parol licence under sect. 3 of the Prescription Act may, under sect. 34, confer legal title. Plaintiff's counsel argued the case on the basis that Mr. Justice Gordon's view of the section was correct and not on that adopted by my brother Kenny.

Solicitor for the plaintiff: *Michael Killeen.*

Solicitors for the defendant: *Thomas Kelly & Co.*

A. E. C.

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Feb. 21.
 April 19.

Malicious Injury—Apportionment of compensation on adjoining counties—Exclusive charge on county where injury did not take place—Invalidity—Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116)—Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37)—County Court Rules, 1899.

On an application for compensation for malicious injuries brought under the adapted provisions of sect. 140, of the Grand Jury (Ireland) Act, 1836 (6 & 7 Will. 4, c. 116), where the injury has been done at a place within the distance of one mile of the boundaries of two counties, the power given to the Court to apportion the burden of compensation between such counties is not properly exercised by a decree which imposes that burden exclusively on the county in which the injury was not done, and such a decree is invalid.

Where the award is less than £100 there is no jurisdiction in the Court to direct that sum to be levied off the county at large.

MANDAMUS.

Motion to make absolute a conditional order for the issue of a writ of mandamus directed to the county council of the county of Cork, commanding them to strike and levy a rate for the payment of £76 13s. 9d., being compensation for the malicious burning and destruction of two ricks of hay, the property of Jeremiah McCarthy, and costs, as awarded by a decree of the County Court Judge of the county of Limerick, dated 20th January, 1915, and ordered to be paid by that council off the county of Cork, and further commanding the council to determine the area of levy.

On the 2nd December, 1914, two ricks of hay, the property of the prosecutor, Jeremiah McCarthy, were maliciously destroyed by fire at Carroward in the county of Limerick, a place situate within a distance of one mile of the boundaries of the counties of Cork and Limerick. On the 20th January, 1915, after service

of the prescribed notices on the county councils of Limerick and Cork, the prosecutor's application for compensation under the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), was heard by the County Court Judge of Limerick at the Quarter Sessions held at Newcastle West. The county council of Cork were represented at the hearing by their solicitor, Mr. Ryan. The County Court Judge by his decree, dated 20th January, 1915, awarded a sum of £67 as compensation, £7 13s. 9d. for costs, and £2 for expenses, making altogether £76 13s. 9d. The form of decree prescribed for the case of injury done within the verge of two counties, that is within one mile of the boundaries of two counties, in the schedule to the County Court Rules of 22nd May, 1899, is as follows:—

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Form 11:—"It appearing to the court that the applicant caused an application to be made to the court under the provisions of the Local Government (Ireland) Act, 1898, at these present sittings for the sum of pounds as compensation for that , and it further appearing that notice of such application was duly served on the respondents and all other proper and necessary parties, and that the applicant has duly made or caused to be made the examination on oath required by sect. 137 of the Grand Jury (Ireland) Act, 1836, and that all necessary preliminary notices have been served and published, And the Court having examined into the matter of such application and having found that the applicant is entitled to the sum of £ as compensation for the injuries complained of; And having further found that the said sum of pounds should be apportioned between the said counties of and and should be raised and levied in the manner hereinafter appearing. It is therefore ordered and decreed by the court that the applicant is entitled to the said sum of pounds as compensation for the injuries complained of and it is further ordered and decreed that the proportion of the said sum of pounds to be paid by the county of shall be the sum of and by the county of shall be the sum of and that the applicant do recover from the respondent the county council of the county of the said sum of together with the sum of for costs and expenses and from the respondent the county council of the county of the said sum of together with the sum of for costs and expenses; And it is further ordered that the said sums of and be raised by the respondents the county council of the county of (Here state the area on which to be raised) And that the said sums of and be raised by the county council of the county of (Here state the area on which to be raised.)"

K. B. Div. The form of decree actually issued in this case was this
 1917. schedule form, adapted by striking out all reference to and provisions for apportionment, so that by deletion and insertion of words in the schedule form the material portion of the decree read as follows:—
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And having further found that the said sum of £67 should be raised and levied in the manner hereinafter appearing, it is therefore ordered and decreed by the Court that the applicant is entitled to be paid the sum of £67 as compensation for the injuries complained of. And it is further ordered and decreed that the said sum of £67 be paid by the County of Cork, and that the applicant do recover from the respondents, the County Council of Cork, the said sum of £67, together with the sum of £9 13s. 9d. for costs and expenses. And it is further ordered that the said sums of £67 and £9 13s. 9d. be raised by the respondents, the County Council of the County of Cork, off the said County Cork.

The decree was brought to the notice of the County Council of Cork by a letter from the prosecutor's solicitors to the secretary of the council, and from that date to the 1st June, 1916, when the council finally refused to raise the amount decreed, a long correspondence took place between the prosecutor's solicitors and the council's solicitor and secretary. The council objected to pay the sum decreed on the ground that the decree was irregular and invalid, inasmuch as it directed that the entire amount should be raised off the County of Cork; and directed that the amount awarded should be raised off that county, which latter direction rendered it impossible for the county council to determine the area of levy.

The following are the material Acts and sections referred to in the argument and judgment:—

19 & 20 Geo. 3 (Irish), c. 37, s. 2, provides:—"And be it enacted by the authority aforesaid, that, where the damages shall not exceed £100 sterling, the inhabitants of the barony, or in case of uncertainty, of the contiguous baronies, wherein the said acts shall be committed, and not of the counties at large, shall make satisfaction for the same as aforesaid; but where the damages shall exceed such sum of £100, then and in such case only the inhabitants of the county, or in cases of uncertain situation, of the contiguous counties at large, shall make satisfaction for the same."

The Grand Jury (Ireland) Act, 1836 (6 & 7 Will. 4, c. 116, s. 135), as adapted, provides:—"In all cases of maliciously or wantonly setting fire to, burning, or destroying any house, outhouse, or other building, or any haggard,

corn, hay, straw, or turf, . . . where an application in respect thereof is made, the County Court may, on the consideration of the said matter, either refuse such application altogether, or make a decree for such sum or sums of money as the person or persons so injured ought to recover for such injury or damage, to be levied off the county at large, or such county or other district, parish, townland, or sub-denomination thereof as the Court shall direct.”

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Sect. 137 of the same statute, as adapted, provides:—“Provided always that every person or persons who shall, under the provisions of this Act, apply for compensation for any loss or damage occasioned by malicious injury as aforesaid, shall within three days after the commission of the said injury, unless prevented by illness or other sufficient cause, give in his, her, or their examination upon oath, or that examination on oath shall be given by his, her, or their servant or servants who had the care of his, her, or their property so injured before such justice of the peace for the county where such injury shall have been committed, thereby specifying whether he, she, or they do know the person or persons who committed the said injury, or any of them, and in such case such examinant or examnants shall be bound by recognizance to prosecute such offender or offenders by indictment or otherwise according to the laws of this kingdom.”

Sect. 140 of the same statute, as adapted, provides:—“Provided also, that in case such burning or other malicious injury as aforesaid shall be committed on the verge or within the distance of one mile of the boundary of any two or more counties the person or persons who shall sustain such injury may apply for compensation, in the manner by the Act and rules of Court directed, in either of any one of such neighbouring counties; and all proceedings shall be taken thereupon as by the Act and rules of Court provided with respect to other applications for damages for malicious injury, and in case any sum or sums of money shall be decreed by the County Court of the county where such application shall be made, . . . as and for compensation to the person or persons applying as aforesaid the judge at the assizes of such county shall have power and authority to apportion the amount of such compensation amongst such neighbouring counties, and shall direct the proportion of the same which shall be paid by them respectively, and shall certify the same accordingly; and such decree shall thereupon be diminished or decree be made according to the proportion which the said judge shall direct to be paid by such county.”

The following are the material provisions of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37):—

“Sect. 5 (1). There shall be transferred to the County Court the business of any presentment sessions and grand jury in relation to compensation for criminal injuries, that is to say, compensation under the enactments mentioned in Part I. of the first schedule to this Act.

“(2) Upon an application for such compensation, the County Court may

K. B. Div. either refuse the application, or make a decree against the county council, and, if the decree is made, shall have the power of a judge of assize under section 140 of the Grand Juries Act, 1836, with respect to the apportionment of the compensation.

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CORK C. C. “(3) Any person claiming compensation in a county may apply to the County Court, and the council for the county and the council for the district in or within one mile from the boundary of which county or district the injury is alleged to have been committed, and also any person paying poor rate in that county may, as well as the applicant, appear and be heard by the County Court in relation to the application.

“(7) Rules of Court may regulate the practice and procedure under this section, including costs, and the services of all preliminary notices and the time within which any proceedings are to be had and taken.”

Part 1 of the first schedule to this statute includes the Grand Jury (Ireland) Act, 1836, sect. 105, and sects. 135 to 140, so far as unrepealed.

The material portions of the County Court Rules of 22nd March, 1899, are as follows:—

“2. The application shall be made in the division of the county where the injury was committed, except in cases coming within sect. 140 of 6 & 7 Will. 4, c. 116, where the injury has been committed on the verge or within the distance of one mile of the boundary of any two or more counties. In such last-mentioned cases the application may be made in either or any one of such neighbouring counties, but shall be brought either in the division where the injury was committed or in the division of the neighbouring county which is nearest to the place where the injury was committed. The judge may adjourn the case from one division to another, or from one sessions to another.”

Rule 7 deals with preliminary notices of applications, which, where it is sought to apportion the compensation between or amongst two or more counties, must be served on the secretary and clerk of the council of every county and district sought to be affected. Rule 12 directs that every decree may be in one of the forms 10, 11, or 12 in the schedule. Form 11 in the schedule is the form of decree where the injury has been done on the verge of two or more counties.

Serjeant A. M. Sullivan K.C. (with him *James Rearden*), for the prosecutor:—

Sect. 140 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Will. 4, c. 116), as adapted, gives the County Court Judge power to apportion compensation in a case like this, and that carries with it a right to exclusively charge the compensation on one county or the other. There is no compulsion on him to apportion in the sense that he is required to put a charge of, say a nominal sum, on one county and the balance on the other.

H. D. Conner K.C., and *T. Sullivan*, for the Cork County Council :—

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Apportionment is essential, and exclusive charge on the neighbouring county is not within the jurisdiction conferred on the County Court Judge: *Re Sterne* (1). In any case there has here been such delay that the writ asked for should be refused and, indeed, must be refused, as the council are protected by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

James Rearden, in reply :—

The correspondence and circumstances show that there has been really no delay, and that the prosecutor could not have moved before. The writ asked for is neither a prosecution nor a proceeding within the meaning of 56 & 57 Vict. c. 61. In any case, there was a continuous obligation on the council to pay, and the default in June is the time from which the protection given by that statute would run. Here the obligation to pay has been ascertained and created by a judgment of a competent Court, and this application is only for the purpose of enforcing the judgment.

Cur. adv. vult.

GIBSON J. :—

This application for mandamus to the county council of Cork to raise a rate for £76 13s. 9d., under a decree of the County Court Judge of Limerick, purporting to be made in pursuance of sect. 140 of the Grand Jury (Ireland) Act (6 & 7 Will. 4, c. 116), as adapted, raises many questions of novelty and difficulty. They are as follows :—

1. Can the Court of the county where the injury was committed (hereinafter described as the “home county”) put the entire liability on a verge county under sect. 140?

2. Assuming that there was jurisdiction to exonerate the county of Limerick, and make the county Cork solely responsible, is the decree for a sum under £100 in accordance with sect. 140 as to the Cork taxable area?

- K. B. Div.* 3. Has the Cork county council now authority to fix such area
 1917. in the county Cork ?
- R.* 4. Is the conditional order for mandamus (which is to strike a
 (McCarthy) rate and not to fix the area and then rate) right in form ?
- v.* 5. Ought a rate, at this distance of time, to be compelled
CORK C. C. which would retrospectively onerate new ratepayers with an old
Gibson J. liability ?

6. Is the Act of 1893, c. 61 (Public Authorities Protection Act, 1893: 56 & 57 Vict. c. 61), a defence to the claim for mandamus ?

An answer in favour of the defendants on any one of the above questions, save the fourth, would dispose of the application.

As to the first question: the jurisdiction under sect. 106 and sects. 135, 136, and 137 of the Grand Jury Act was confined to the home county, which is treated as constructively to blame: *Ballymagauran Co-operative Agricultural Society v. County Councils of Cavan and Leitrim* (1); *Pinkney's Case* (2), where the English cases are collected. Under sect. 106, the grand jury of the home county assess the compensation, and have a limited right of choice as to the area of levy as between the county at large and the barony where the offence has been perpetrated. The Court now has discretion as to the unit under the amended section. Sects. 135 to 137 prescribe notices, applications to presentment sessions, examinations; and the grand jury assess compensation and direct the units of taxation, the smallest of which is a sub-denomination of a townland. Sect. 140 relates to injury committed within the distance of one mile of the boundary of two or more counties. The application may be made in any one of such neighbouring counties, and proceedings are to be taken thereupon as thereinbefore provided with respect to other applications for damages for malicious injury. All such counties are supposed to be possibly subject to imputed responsibility. Nothing is said as to presentment sessions. The notices prescribed by sect. 135 and examinations under sect. 137 apply to the home county only. The County Court rules of 1899 continue this.

(1) [1915] 2 I. R. 85.

(2) 2 William Saunders, 758 (last ed.).

Where an application is made in a verge county, not the home county, must it have been brought before presentment sessions in that county? In such case, is sect. 136 (as to presentment sessions in the home county) displaced? There can hardly be two co-ordinate presentment sessions operating on the same subject-matter, with perhaps different results.

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Sect. 140 does not purport on its face to invest the grand jury with capacity to name the chargeable unit or units. It is the judge who is to apportion, not the grand jury, who would have an interest in diminishing the liability of their own county at the expense of the other counties, and who might be exposed to suspicion of partiality. The grand jury of the neighbouring county is ordered to present the apportioned amount on the certificate of the assize judge; and the presentment, where the sum exceeds £100, must be raised off the county at large, and, where the sum is less than £100, must be raised off the barony or baronies in or near which the injury is alleged to have been committed. The reference to £100 or less as determining the area of levy is taken from 19 & 20 Geo. 3, c. 37, sect. 2 (Irish), which, however, deals with counties and baronies in a somewhat different way. The word there used is "contiguous," not "near." The statute was cited in *Re Millar* (1). The word "in" must refer to the home county. The term "near" (not "nearest") is of uncertain meaning. It may be the same as "contiguous"; it may contemplate primarily the adjoining county; it may have a wider operation; and the judge or grand jury might, by implication, have jurisdiction to describe the barony or baronies to be considered "near."² Whatever is the construction of the provision, it substituted for the power of applotment in sect. 135 (which makes a sub-denomination of a townland the smallest chargeable unit), the county at large and the barony, in that respect following the plan of the 19 & 20 Geo. 3, c. 37, sect. 2 (Irish), and sect. 106. There is no discretion in the grand jury; which of the units is to be charged is governed by an inflexible statutory rule. The barony is in sect. 140 the smallest taxable unit. The intention of the Legislature may have been to avoid friction and controversy where there were several contributory

(1) 2 Jebb & Symes, at p. 275.

K. B. Div. counties by itself defining the area of levy, which, in case of
 1917. counties outside the application county, would be convenient;
 R. what applied to such counties should possibly govern the appli-
 (McCarthy) cation county as well, so as to secure perfect equality of treatment.
 v. *Re Sterne* (1) (noted in 1883 in Vanston's Grand Jury Laws)
 CORK C. C. represents the opinion of the judges as being that apportionment
 Gibson J. under sect. 140 was obligatory. It does not appear to have been
 questioned while the Grand Jury Act was in force, so far as
 reported cases show. I do not recollect any instance since
 1870 where the question was raised.

The difficulty in this case has been caused by letting portions of sect. 140 stand possibly inconsistent with the rules of 1899, which can hardly repeal the express affirmative provisions found in the adapted section. It is on the amended statute (Vanston, p. 297, Local Government (Ireland) Act, 1898, 61 & 62 Vict. c. 37), sect. 5, with rules thereunder, that our decision depends. The references to notices (sect. 135) and to presentment sessions disappear. Sect. 135 now speaks of the place where the application is made, and enables the County Court to decree compensation, and fix the area to be charged on the same lines as sect. 135 in its original form. Sect. 137 preserves the obligation as to sworn examinations, which must still be made before a justice of the home county. Sect. 140 is subject to rules which would appear to be of a supplementary or ancillary character, and which, though they may enlarge and define, can hardly contradict the positive provisions which the section enacts. The only change as to area is the substitution of "district" for "barony." The loose word "near" is allowed to remain. The larger rateable unit is still the county at large. If an assize judge would be unable to alter the statutory prescribed area under sect. 140, the County Court could hardly have an implied power of more extensive operation. As already observed the pre-appointed units, varying according to amount, go back to 19 & 20 Geo. 3, c. 37, sect. 2 (Irish).

The County Court Rules and Forms of 22nd March, 1899 (Vanston, pp. 297, 1258 to 1269), modify sect. 140, and prescribe procedure. Rule 2 deals with applications; rule 5 with

notices; rule 6 with examinations, which, as before, must be taken before a justice of the home county; rule 7 with applications. Form 6 is for an application under sect. 140; it demands apportionment, which the county court judge is assumed to grant; and asks him to fix the area of levy. Sect. 140, however, itself describes the chargeable units. Form 11 is the most important; it follows the application form and assumes jurisdiction to apportion, settle proportions, and name the taxable areas, as to which my previous observation as to the effect of sect. 140 applies.

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Up to the present there has been, I believe, no example of a decree like that before us, where, the application being in the county the scene of the injury and prima facie responsible, the entire liability has been placed on a neighbouring county. Is apportionment in such a case a requisite, or is the provision merely directory? In dealing with county divisions with conflicting interests Parliament may have considered it desirable to lay down a rigid rule and make each of the neighbouring counties pay something. The rules, forms, and practice are on that assumption, which is favoured by the opinion of the judges in *Re Sterne* (1), which applies, at least where the home county is the subject of application.

There is a circuit case of *FitzGerald v. Tipperary S.R. County Council* (2), where Lord Justice FitzGibbon held that the use of forms 6 and 11 was optional where the application was made in the home county. The difficulties which occur to me, and which I venture to point out, were not discussed or dealt with in the decision. The application may be made in any county within sect. 140, and is not confined to the home county. The application county is interested in having the other counties brought in to bear their possible share. The right ought not to depend on the election of the applicant, whose interest it might be to confine the area of levy to the application county, where his rateable property might be insignificant, and to exonerate the adjoining county, where his rateable liability might be heavy. What is to happen if the judge thinks the adjoining county should be charged? Would the application in such case fail wholly or pro

(1) *Res. Ca.* 38.

(2) 40 *I. L. T.* 80.

K. B. Div. 1917. tanto? or could the judge, notwithstanding that the rules of 1899, as to time, notices, &c., had not been complied with, adjourn the hearing to enable the outside county to be made defendants, with inevitable delay and costs? Is not the true view of sect. 140 that, though the application may be made in any of the prescribed counties, all the counties possibly affected are to be treated as if one county, but with special conditions as to the units of levy? Such special units, inconsistent with those in sect. 135, indicate a distinct mode of dealing with counties in combination, and such mode can hardly be displaced by the choice of the applicant in selecting one county. The case, however, is not directly in point here, where the forms of application and decree are appropriate to apportionment, and the entire levy has been put on an outside county. Precedent and practice are opposed to such decree; and though the point is one of doubt, I think the decree is erroneous. All the initial steps to found jurisdiction such as notices under rule 5, examinations under sect. 137, must still be taken in the home county, which under sect. 135 (putting aside sect. 140) is the subject of imputed blame for the offence committed within it. Was it intended that it should escape scot-free?

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Where the application is made in the home county against that county as the object of direct and primary attack, it would seem an inversion of ordinary judicial procedure that it should be acquitted and all the blame with its consequences put on a county only derivatively answerable. Had the application sought to visit Cork with exclusive responsibility, the fair course would have been to apply in that county. The course here adopted would be a complete surprise to the contributory county, which would naturally entrust the defence as to injury and amount to the County Limerick—a duty which the latter county might insufficiently perform if it was to pay nothing. It would not occur to anyone where the entire lis arose and was conducted in Limerick that Cork alone was to be condemned.

2. The decree, in the form prescribed in the rules, form 11, purports to direct that the amount, though under £100, is to be levied off the County Cork, which means (see forms 5, 6, and 11) the county at large. Under sect. 140, unless the rules displace it,

which they cannot do, there was no jurisdiction to direct such area of levy. I do not think the decree could now be set right, and the rate must follow the decree. How could the County Council treat this part of the decree as a nullity and the form prescribed by rules as ultra vires? Should it not be first got out of the way by some judicial action?

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3. The point mainly argued as to this difficulty was that the County Council could itself now define the district to be regarded as "near." Whether "near," an elastic term, means "nearest" or "contiguous," or whether the judge could define the "near" district by his decree, I doubt if the Council could so define, at least in face of a decree making the county at large liable. The reference to "districts" in the plural emphasizes the ambiguity of the term "near."

Why sect. 140 has been maintained in its present misleading form I cannot understand. The Council is to present the proportion on the certificate of the assize judge, whose decree is, I believe, in practice taken as sufficient without any certificate. If the judge could certify the same condition should apply, I suppose, to the County Court, which has, of course, no wider jurisdiction. The power of apportionment conferred on the County Court by sect. 5 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37; Vanston, 1227) would have made an amendment in sect. 140 desirable. Its present shape is unfortunate.

4. The conditional order requires a mandamus to strike a rate. There could be no rate till the district to be charged was ascertained. If the County Council could now by resolution fix the district or districts as "near" within the provisions of sect. 140 (the difficulties as to which I have already pointed out), the conditional order does not, expressly at least, require them to do so. Probably, however, this objection, if valid, could be met by amendment.

5. The lapse of time since the date of the decree, unless satisfactorily explained, might warrant refusal of mandamus, as the result would be to charge present ratepayers with a bygone liability, which should have been previously discharged. The authorities on this subject, such as *Reg. v. Leigh Rural District Council* (1);

(1) [1891] 1 Q. B. 836.

K. B. Div. *Croydon Corporation v. Croydon Rural District Council* (1), were not
1917. discussed, and I do not now propose to decide this difficult point.

R.
(McCarthy) The apparent delay has been such that clear evidence of justifica-
v. tion, by conduct or otherwise, should be required. Whether such
Cork C. C. justification is supplied by the correspondence and circumstances
Gibson J. I do not deem necessary to determine, as the argument did not
deal sufficiently with this aspect of the case. The Grand Jury
Act requires promptness in application: sect. 136 and notes to
Vanston's Grand Jury Laws, p. 133.

6. Mr. Conner relied on the Act of 1893, c. 61 (Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61), as an answer to the application. The point took Serjeant Sullivan, not unnaturally, by surprise, and he left it to be met by his junior in reply. The latter argued that the statute did not apply (a) because the words "prosecution or proceeding" did not cover the prerogative writ of mandamus; (b) because there was a continuous obligation to pay, and there was no default until the present application was made; (c) because the claim was under a judgment which the mandamus was only a means of enforcing. Counsel for the Council argued that the writ was a "prosecution"; that it was in substance a civil remedy, different, in a case like the present, in form only from an action for mandamus, but in reality with the same object and result. The only authority on the subject was the dictum of a judge that the prerogative writ was not within the statute. It might be said that if delay may be an answer to the writ to enforce a judgment (as the cases referred to above in sect. 5 of my judgment appear to show), Parliament might have thought it expedient to prescribe a fixed period of limitation. In none, however, of the cases where delay was relied on was the statute sought to be applied. The operation and application of the Act it is not necessary now to determine, as the motion must be refused on other grounds. I refrain, therefore, from expressing any opinion on this last point.

(1) [1908] 1 Ch. 222.

PIM J. :—

The questions in this case are complex, and no Court could answer them without much doubt. Having given considerable thought to the case, I was inclined, though not without hesitation, to grant the mandamus asked for, but I have since read my colleague's judgment, and it appears to me that it would be right for me not to deliver any adverse judgment, but to let the order go.

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The case is of very great importance, and should be brought to the Court of Appeal, and it is better that there should be an order from which to appeal. In the circumstances, while not agreeing with the judgment just delivered, I will not dissent therefrom, and the order refusing the application for mandamus will issue.

Solicitors for the prosecutor: *James Binchy & Sons.*

Solicitors for the Cork County Council: *Thomas Exham & Son.*

C. N. K.

[See as to the prerogative writ of mandamus being an action *R. v. Westminster Assessment Committee*, [1917] 2 K.B. 215.—C.N.K.].

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JOHN HOOD & COMPANY, LTD., v. MAGEE (1).

June 18, 19. *Revenue—Income Tax—“Person residing in the United Kingdom”—Company registered in Ireland—Managing Director resident in the U. S. A.—Business carried on both in Ireland and abroad—Income Tax Act, 1853 (16 & 17 Vict. c. 34), sect. 2, Schedule D.*

A “one-man” company, whose sole director and manager is ordinarily resident in the United States of America, may be resident in the United Kingdom within sect 2, Schedule D, of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), and liable to pay income-tax upon the whole of its profits wherever earned.

De Beers Consolidated Mines, Ltd., v. Howe, [1906] A. C. 455, distinguished.

CASE STATED under 43 & 44 Vict. c. 19, s. 59, by the commissioners for the special purposes of the Income Tax Acts, to whom at a meeting of the commissioners held at Belfast on the 5th of November, 1915, the plaintiffs had appealed against two several assessments made upon them under sect. 2, Schedule D, of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), in respect of the profits of the business carried on by them. The only point raised by the case was whether the plaintiff company was resident in the United Kingdom for the purposes of the Income Tax Acts. The following statement of the facts is taken from the judgment of Gibson J. :—

By agreement, dated 11th December, 1912, John Hood sold to David M’Troy, as trustee for the intended company, the business of John Hood at New York and Belfast, as linen merchant and commission agent, for the sum of £28,661 13s. 9d., to be paid by allotment of 1,030 fully paid £10 ordinary shares and £18,361 13s. 9d. cash. From August 31st, 1912, all profits were to be received by the company, who were to be responsible for all losses. All existing employees were to be taken over. The contract was adopted by the company on 9th April, 1913. Both the original and the confirming agreements were executed by

(1) Before GIBSON, KENNY, and MADDEN JJ.

Mr. Hood in Belfast. The company was incorporated on January 10th, 1913, under memorandum and articles mentioned in the agreement of December 11th, 1912. It was also registered in America. The date of this registration is not stated, nor was the constitution of the American company or relevant American law proved. It was assumed at the Bar (doubtless rightly) that the registration was only for the purpose of American law, and that the American company was essentially the Irish company, with identical capacity and powers. The owning company was that registered in Belfast. The memorandum was signed by John Hood, of 104 Franklin Street, New York, linen importer, and David McIlroy, of 14 Linenhall Street, Belfast, linen merchant, who were each taking one share. The objects of the company were of the widest character both as regarded business and locality of operations. The capital was 1,000 preference £10 shares and 2,000 ordinary £10 shares.

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Under the articles a general meeting was to be held once a year at any place determined by the directors, and at such meeting two members personally present were to be a quorum. The chairman, if any, of the board was to preside. Every member had one vote for each share, whether preference or ordinary. John Hood was to be the first director. The number of directors was to be fixed at a general meeting, which also had power to elect such directors. The general management of the company was vested in the directors, who might be represented by proxies. They were to meet for the despatch of business at such time and place as they thought fit. A resolution by one director was to be valid. Proper minutes were to be kept. An auditor was to be appointed at each ordinary general meeting. Subject to the rights of preference shareholders, the profits were divisible among the ordinary shareholders in proportion to the amounts paid up. Transfer of shares could be refused by the directors. Under the memorandum and articles, John Hood, while he was director, had exclusive and supreme control. The only ostensible checks would be the general meeting (at which two were to be a quorum), and the auditor—neither check of value. The place of meeting to be appointed by Mr. Hood. The quorum of two, to be personally present, of members living so far apart made Mr. Hood's

K. B. Div. continuance as sole director with automatic powers safe, and he
 1917. would appoint the directors. The checks on him were only paper
Hood & Co. checks. The proceedings of the company after registration were
v. recorded in the official minutes as follows :—By resolution passed
MAGEE. by John Hood at Belfast on April 9th, 1913, the date of the
 statutory meeting, the two signatories to the memorandum (that
 is John Hood and David M'Iroy) were allotted one share each;
 the seal of the company was to be attached to the agreement
 ratifying the sale; 1,030 shares were allotted as fully paid to John
 Hood; G. F. Shanks was appointed auditor; banks were named
 for Belfast and America; cheques on the Irish bank were to be
 drawn by any one of the directors or by David M'Iroy, and on the
 American bank by any director or by such person or persons as
 John Hood should appoint. Negotiable instruments on behalf of
 the company might be executed by any director or by David
 M'Iroy. In accordance with applications received, allotments of
 shares were made; preference as follows :—Paul Rudolph, 200;
 Frederick William Smith, 67; Frederick Hoelscher, 67; James
 Shaw, 350; George F. Shanks, 37; ordinary as follows :—
 Frederick William Smith, 33; Frederick Hoelscher, 33; James
 Shaw, 310; David M'Iroy, 20—all to be paid by allotment. By
 resolution passed on 16th April, 1913, also at Belfast, David
 M'Iroy was appointed secretary. His salary is nowhere stated,
 nor is the remuneration of the auditor. By resolution of John
 Hood, dated 1st May, 1913, at New York, and entered in the
 company's minute-book, 200 ordinary shares were allotted to
 Paul Rudolph, certificate to be issued on payment. By like
 resolution, dated 19th June, 1913, at New York, endorsements on
 behalf of the company in respect of cheques, &c., with the American
 bank were authorized to be made by John Hood, David M'Iroy,
 and Frederick Hoelscher. David M'Iroy lived in Ireland, and
 the authority to endorse American drafts is noticeable. By like
 resolution, dated 26th July, 1913, at Belfast, special authority as
 to powers of attorney in respect of Customs requirements was con-
 ferred. By like resolution, dated 13th August, 1913, at Belfast,
 100 ordinary and 50 preference shares were allotted to Mr. Alfred
 Dewsbury, to be paid 50s. per share on allotment and the balance
 on or before 31st December next.

On November 30th, 1913, the date to which the first accounts were made up, there were six preference shareholders holding 771 shares, and seven ordinary shareholders (including John Hood) holding 1,768 shares. They are named in paragraph 9 of the case. Three have the same address, 104 Franklin Street, New York: namely, John Hood; Smith, described as salesman; and Hoelscher, described as clerk; M'Iroy's address is 14 Linenhall Street, Belfast, and he is described as secretary; James Shaw, with a Belfast address, with the largest holding of both preference and ordinary shares, 350 each, is described as a solicitor's clerk. The third Belfast shareholder was Shanks, described as accountant. The two members outside Ireland and America were Paul Rudolph of Waldorf, Saxony, manufacturer, holding 200 of each class of shares, and Alfred Dowsbury, gentleman, residing in England. If the shareholders were independent and differed from Mr. Hood on the management of the company, they had nominally a majority of votes had they chosen to attend a general meeting—a remote possibility, considering their separate distant residences, their interests, the sufficiency of a quorum of two, and the right of Mr. Hood to appoint the place of meeting.

On the 17th February, 1914, the certified accounts and balance sheet were considered by Mr. Hood at Belfast, dividends recommended on the net profit, £2,291 2s., and a report prepared for the first general meeting. On 20th February, 1914, the certificate of the auditor, Mr. Shanks, was attached to the accounts. It states he has amalgamated the audited and certified New York accounts. These latter are not set out in the case. The account D. states purchases as £47,164 12s. Though the case mentions Scotch business, it was stated by the appellants' counsel that this sum represents Irish buying. The large sum for salaries, £5,455 12s., is not accounted for by showing how much was for Irish employees and how much for others, nor where they were employed, nor is the item for consignment sales explained. The first general meeting was held at Belfast on March 2nd, 1914, when Mr. Hood, Mr. M'Iroy, and Mr. Shanks were present. The report of Mr. Hood was adopted and dividends declared accordingly. Mr. Hood was re-elected sole director for the ensuing year, and Shanks was elected as auditor. It is strange that Mr. Hood's presence on this occasion,

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K. B. Div. The most important event in the life of the company, is omitted from
1917. paragraph 14 of the case, enumerating his visits to Ireland. The
HOOD & Co. only other accounts in the case are as to Belfast sales certified on
v. date 6th November, 1914. At this first meeting, it was ordered
MAGEE. that shareholders in New York and Germany were to be paid from
the New York house, and those in Belfast and England from the
Belfast office on receipt of cash from New York. The second
annual general meeting was held on 16th April, 1915, at Belfast,
in the presence of Mr. Hood and the other two. All dividends
were to be paid direct from New York. Mr. Hood was re-elected
sole director as before and Mr. Shanks was elected auditor. New
York auditors were also named. The course of business is described
in the 14th and following paragraphs of the case. The whole
motive or driving power propelling the company machine and
guiding its movements and operation came from John Hood, who
was, however, operating in New York, not in his own person, but
as director of the company of which (to use another figure) he was
the mainspring. As a general rule he directed the purchases,
but the necessities of prompt purchase in market fluctuations may
have made some departure from this expedient. At times M'Iloy
was given a discretion, within certain limits, as to prices and
quantities. Whether this discretion was given by writing or
orally does not appear. There were trifling sales of goods of
small value effected in Belfast. The trade required not only pur-
chases but contracts with other firms for bleaching and finishing,
manufacturing processes. There is no evidence as to any special
authority having been given for such contracts, which, of a
subordinate character, were probably left to M'Iloy with local
knowledge, who, if his conduct was disapproved of, would have
been called to account by the director. The folding by hand was
done at the Belfast warehouse by employees there. The finished
articles, after the necessary processes were completed, were exported
to America, and the profits now assessed are the result of the sales
there. The travelling expenses (of whom does not appear) are put
at the high figure of £1,626 12s.

The circumstances relied upon as justifying a conclusion of
fact as to residence in Ireland of the company for income tax
purposes are as follows:—The company was registered in Ireland

and had its office there. Its general meetings were held at Belfast, and all the material official proceedings of the company were during the period under consideration conducted by Mr. Hood in person at Belfast. It exercised a trade in Ireland, buying, then bleaching and finishing through other firms, and, finally, folding at its own warehouse. Its secretary and auditor were Irish; its minute books were kept and entered there; and one of its banks was Irish. It owned the American and Irish business as one entire entity; the trade profit represents the difference between cost in Ireland and the sale price in United States.

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S. L. Brown K.C. (with him *H. Wilson K.C.* and *James Andrews*), for the plaintiffs:—

The sole question is whether the plaintiff company is resident in the United Kingdom, within the meaning of sect. 2, schedule D, of the Income Tax Act, 1853. We submit that upon the authorities the company must be held to be solely resident in the United States of America. The sole direction of the company is under the articles entrusted to John Hood, the sole director. No doubt in 1912-13 and 1913-14 the meetings of the company were held in Belfast, but they consisted of the sole director, the secretary, and the auditor. In all essential matters Mr. Hood controls the business of the company. Only in exceptional cases is Mr. McIlroy, the Irish representative, allowed to buy within defined limits under general instructions. It is admitted that the company is under the Income Tax Acts liable to pay income tax in respect of the small trade carried on in Ireland. The Commissioners could not on the facts find the company to be legally resident in the United Kingdom. The case is ruled by the *De Beers Case* (1). In that case the company was held to be resident in England, though its general meetings were held in South Africa, on the ground that the business carried on by the company was controlled from England. The present case is the converse case.

A person can only have one residence under the income tax law for the purpose of trade—under schedule D. The *San Paulo Case* (2) is entirely distinguishable, as in that case the company was an English company resident in England.

(1) [1906] A. C. 455.

(2) [1896] A. C. 31.

K. B. Div. The question is not where the trade is carried on, but where
 1917. the real business control exists: *Egyptian Hotels, Ltd., v. Mitchell* (1).
Hood & Co. *Kodak, Ltd., v. Clark* (2) and *Gramophone and Typewriter Ltd., v.*
v. *Stanley* (3) are both irrelevant, because they go on the basis that
 MAGEE. the company was resident in England. *Goerz & Co. v. Bell* (4).
 shows that the matter to be looked to is where the controlling
 power is exercised.

Carrigan K.C. and *George W. Shannon*, for the defendant :—

The Commissioners have found the residence of the company as a fact, and if there is any evidence to support this finding it cannot be impugned: *American Thread Co. v. Joyce* (5); *De Beers' Case* (6). Registration in the United Kingdom, together with some trade there, shows residence in the United Kingdom, and is conclusive, and the place of control need not be looked for: *Calcutta Jute Mills Co., Ltd., v. Nicholson* (7).

Further, if the place of control is sought in this case, it is in Belfast. During the period under discussion all the official acts of the company were done in Belfast, the place where its powers were really exercised.

The *De Beers Case* (6) is really in favour of the defendant's contention, as all the administrative acts of the company were there held to be done in London. What is to be considered is the personality of the company, and not of its managing director, Mr. Hood. The converse of the *De Beers Case* (6) does not apply.

In the *Calcutta Mills Case* (7) the business of the company was foreign business. In the present case the company deals in linen—a product peculiarly Irish—and finishes it in Ireland. The goods are manufactured in Ireland, and there is a profit on the manufacture of the goods as apart from the sale. The linen is bought in an unfinished state, and by bleaching, &c., turned into a finished article. This is a part of the operation on which there is a profit.

(1) [1914] 3 K. B. 118, at p. 131;
 [1915] A. C. 1022, per Lord Parker,
 at p. 1037.

(2) [1903] 1 K. B. 505.

(3) [1908] 2 K. B. 89.

(4) [1904] 2 K. B. 136.

(5) 29 T. L. R. 266.

(6) [1906] A. C. 455, at p. 459.

(7) 1 Ex. D. 428, at p. 452, per
 Huddleston B.

They referred to the *San Paulo Case* (1).

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Mr. Hood does not carry the residence of the company in his pocket. If he died, a meeting of the company in Belfast could nominate his successor.

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H. Wilson K.C., in reply:—

The dominating factor in determining residence for the Income Tax Acts is control: Halsbury, vol. xvi, par. 1302. The *De Beers Case* (2) was approved of in the *Daimler Case* (3) by Lord Parker and Lord Atkinson, who recognize the doctrine of central control. The real question is, where is the brain that dominates the trading of this company? Every contract for the purchase of material was directed from the U.S.A.: *Egyptian Hotels Case* (4).

It is for the Court to determine any question of mixed law and fact.

Cur. adv. vult.

GIBSON J.:—

June 27.

The argument before us has been confined to one point: Was the company, registered, having its office and exercising trade or business in Ireland, residing during the assessment period in that country within the meaning of 16 & 17 Vict. c. 34, sect. 2, Schedule D, as interpreted by judicial decision? If it was so residing, it is admitted that the assessment was right. According to Mr. Brown, the fact of residence being determined by the place where supreme control is found, with this company such control was at New York.

The case stated, which the statute of 1880, c. 19, sect. 59, requires to set forth the facts and the determination, concludes in an unusual form, stating that the Commissioners were of opinion that the liability of the company fell to be dealt with under First Case, Schedule D, on the whole of its trading profits. There is no express finding as to the conclusion of fact in reference to residence or control. The determination, however, of the Commissioners involves such finding of fact against the company, which, unless resident, could not be charged under the First

(1) [1896] A. C. 31.

(2) [1906] A. C. 455.

(3) [1916] 2 A. C. 307.

(4) [1914] 3 K. B. 118.

K. B. D. Case. If there was evidence from which the inference of residence could be drawn, the decision of the Commissioners binds 1917.
Hood & Co. the Court, which cannot substitute its own view for theirs: the
v. *De Beers Case* (1), the *American Thread Co. Case* (2).
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Gibson J. I shall first discuss the evidence founding the conclusion of fact, and then shall briefly refer to the authorities cited as relevant, or supposed so to be.

The company was an unusually perfect specimen of the one-man type, managed, as it was, by John Hood, who had owned and sold the business, and who, as sole director, controlled its operations from New York, where the profits on sales now sought to be charged were made. Had John Hood remained owner of the American and Irish business, carried on in the way described in the case, buying at Belfast through his branch office, and having the goods prepared there for the American market for sale, I express no opinion whether by reason of his trade being so partially localized here he could be deemed to be resident. The point is not covered by *Sulley v. The Attorney-General* (3). The problem before us relates to a company locally domiciled and owning the entire business conducted in Ireland and America.

[His Lordship, having stated the facts as above set forth, continued]:—

The tree cannot be separated from its fruits. The portion of the trade transacted here was with a view to the ultimate sales. The company (and not Mr. Hood) were liable on contracts here with sellers, finishers, and employees; and on American sales would have been liable to American purchasers for any breach of contract, as to quality or otherwise. Profits belonged, and liability and losses attached, to the company exclusively in respect of the business which they, and not Hood, owned.

Though the brain of Mr. Hood as a human being directed the company's operations, and though an external observer might not notice much difference in the way the business was carried on by him after he had legally ceased to own it, he was as director acting under special delegated authority from the company a distinct

(1) [1906] A. C., at p. 459. (2) 108 L. T. 353; 104 L. T. 217; 106 L. T. 171.
 (3) 5 H. & N. 711.

legal person; it matters not in law that the company was John Hood disguised in limited liability attire: *Salomon & Co. v. Salomon* (1); *The Gramophone Case* (2). K. B. Div.
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The above materials warrant the conclusion of fact formed by the Commissioners (and, indeed, my own) that the company for income tax liability resided in Ireland, unless there be authority compelling a decision otherwise. The matters I have enumerated must be taken together, but I am far from saying that the absence of some would make any difference in the result. The company in its visible responsible operations, contracts, staff, ownership, distribution of profits, &c., was an Irish company, though its executive dealings were in the hands of Mr. Hood as agent. The residence of the company cannot be determined by Mr. Hood's choice of his own residence. No doubt, wherever he went, he carried his functions with him. He might have gone for health to Davos or Colorado for two years and equally controlled the business from his new home, either personally or through managers in New York and the agents appointed by him. All the same, he was not the company; it owned his brain and capacity as well as the business. The tap-root of the fruit-bearing tree was at Belfast.

It is, however, urged by Mr. Brown that decisions settling the law demonstrate that, on the facts found, the company could not be deemed to have an Irish residence. The cases may be divided into two classes:—those as to residence of foreign companies and those as to home companies. In considering both, it is essential to keep steadily in mind that residence, as a question of fact, depends on the particular evidence before the Court; the danger must be avoided of extending a principle applied to such evidence to control dissimilar facts. The authority relied on by Mr. Brown as decisive and excluding any possibility of doubt was the *De Beers Case* (3), which decided that an African company, controlled from the central authority in England, was resident here, though its home and profit-earning activity were in South Africa. He argued that the Hood Company being in fact controlled by Hood must be taken to reside, not in Ireland but, where the director directed operations. The facts there were

(1) [1897] A. C. 22. (2) [1908] K. B. 89. (3) [1906] A. C. 455.

K. B. Div. 1917. widely different from those with which we have to deal, and I do not think the case governs and applies to this Irish company carrying on its business in Ireland and America in the manner I have discussed. Its commercial centre was at Belfast. *Grainger v. Gough* (1) was also referred to. It was there held that a foreign firm did not exercise trade in the United Kingdom. The question of residence and control, now under consideration, was not before the House of Lords. *The American Thread Co. Case* (2) is of the same type. The reasoning seems inconsistent with the *prima facie* commercial residence of the Irish company being displaced and income-tax residence being ascertained conclusively from the locality whence Mr. Hood directed purchases and sales. The principal home company cases mentioned were the two cases in 1 Ex Div., 428: *The San Paulo Railway Case* (3); *Sulley v. Attorney-General* (4); and *The Egyptian Hotels Co.* (5). In the first the enterprises were carried on abroad; but from the nature of the management the companies were held to be resident within the kingdom. *The San Paulo Railway Case* (3) was of the same type, a foreign railway owned by an English company. The trade was partly in England, where the central authority was found. *Sulley v. Attorney-General* (4) was based on facts found by a special verdict set out in the report in 4 H. & N., 769. The business belonged to a New York partnership. One of the partners living in England purchased the goods on behalf of the firm, and shipped them to America, where all the sales took place. The goods were not manufactured or resold in England. A large part of the profits was from goods purchased in France, Germany, and America. The local partner was held not to be chargeable in respect of all the profits of the partnership as resident in England, and Mr. Carrigan relied on the verdict negating any manufacturing process such as the case stated mentions. The topic was noticed by Mr. Mellish in his argument; but if it affected the judges (which is doubtful) it is not referred to by them. Here the facts are quite unlike. The trade was exercised in Ireland by the owning company, which for

(1) [1896] A. C. 325.

(2) 106 L. T. 171; C. A. 108

L. T. 353 H. L.

(3) [1896] A. C. 31.

(4) 5 H. & N. 711.

(5) [1914] 3 K. B. 118; [1915] A. C. 1022.

its own profit sold in America by its agent. For the time being such representative might be free from risk of removal for each year, and might, on behalf of the company, possess unlimited powers; but his position, however secure, and his authority, however wide, did not vest in him separate personality. He did not control the company as if he was an external power. It is through the company that as director he lives and has his being. All his actions must be referred to their originating delegation. *The Egyptian Hotel Co.'s Case* (1) is more in point. There the English company was held not to be chargeable on the double ground that the control under the articles was exclusively vested in the Egyptian board, and that no trade was carried on in the United Kingdom, Cozens-Hardy M.R. dwelling on the former ground, Buckley L.J. on the latter. On appeal to the House of Lords (2) there was an equal division of opinion. The speeches of all the learned law lords are valuable in reference to the situation before us. Whatever control Mr. Hood possessed under the articles he took with him to any place where he happened to be, whether his permanent residence or not, but a vital part of the business was to be done and was done in Ireland. In the case of foreign companies operating from or in connexion with an English base, it is obviously easier to infer residence from the use of such base and the powers there exercised, than to disaffirm residence in case of a home company trading in part here. No case has been cited, and perhaps none exists, where in such instance the home company has been held not to be resident. Such cases as *The Kodak Co.* (3) and *The Gramophone Co.* (4), relating to distinct companies trading abroad, do not touch the present position, where there is but one corporate body. In many cases much importance was properly attached to meetings—an element which here is found. I offer, however, no opinion whether, if the meetings of the company were held in America or elsewhere abroad, that circumstance would be conclusive against the company's residence in Ireland, while it trades as it does under the present articles.

Mr. Wilson, in reply, referred to an authority not opened by Mr. Brown, or mentioned previously during the argument, the

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(1) [1914] 3 K. B. 118.

(2) [1915] A. C. 1022.

(3) [1903] 1 K. B. 505.

(4) [1908] 2 K. B. 89.

K. B. Div. Daimler Co. Case (1), where it was held that the acts of a company through its organs, directors, and so forth, functioning *intra vires*, might invest such company with enemy character. Assuming that Mr. Hood might have used his authorized powers for enemy purposes, and thereby affected his Company, I do not see that such result could decide the fact of residence of the Company to be ascertained from the considerations already examined. If the African company in the *De Beers Case* (2) had adhered to or had helped the enemy, it might have been invested in its African operations with enemy character, notwithstanding that the central control was in England. The analogy of control as a condition of income tax responsibility was used to show that the motive force governing the action of the company as a separate legal person might be looked to, and that attention was not to be confined to the corporate person. If a corporation which has neither body nor soul can be made responsible for fraud or malice, the action of its directors with commercial control may attribute to it a hostile character.

I am of opinion that the present case lies outside any of the authorities brought before us for the appellants; that there was evidence to support the decision appealed from; and that the determination of the Commissioners was, on the facts, correct in law. If the inference of fact was to be drawn by the Court, I should find myself unable to disagree with the conclusion of the Commissioners.

MADDEN J. :—

The appellants, John Hood & Co., Ltd., have been assessed for income tax in respect of the business carried on by them, on the assumption that the residence of the company is in Belfast. The company being dissatisfied with the decision of the Commissioners, as being erroneous in point of law, a case was stated for the opinion of this Court, pursuant to 43 & 44 Vict. c. 19, s. 59. It is admitted that the question upon which our opinion is required is that of the residence of the appellant company.

This is a mixed question of law and of fact. The facts have been clearly set forth in the case signed by the Commissioners, and

(1) [1916] 2 A. C. 307.

(2) [1906] A. C. 455.

by the facts, as stated by them, we are bound. The law applicable to an inquiry as to the residence of a joint stock company has been laid down authoritatively in decisions of the House of Lords, and what we have to do is, applying the principles of these cases to the facts found by the Commissioners, to determine the question of the residence of the company. Upon the determination of this question the amount to be assessed upon the appellants in respect of income tax will depend.

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The company was incorporated in Ireland on January 10th, 1913, as a company limited by shares, having a registered office in Belfast. The object for which the company was established was to take over the business of the firm of "John Hood & Co.," of Franklin Street, New York, who were merchants and commission agents dealing in linen, cambric, cotton, lace, and articles of a similar character. It was agreed on both sides that the company should be treated as a new concern as from the date of its registration, and it has been so dealt with in the case.

The memorandum of association contains this clause, "The registered office of the company will be situated in Ireland." It is stated that the company has been also registered in the United States of America under the same title as in Ireland. There is no further reference in the case to the American company, and I part with it, noting that as it is stated to be the company which was registered in Ireland, it is an essential part of its constitution, as defined by the memorandum of association, that its registered office must be situated in Ireland. Passing to the articles of association I find that the annual general meetings of the company are to be held at such place as the directors shall from time to time determine. The first statutory meeting of the company was held in Belfast on April 9th, 1913. The first annual ordinary meeting was held at the registered offices of the company in Belfast in March, 1914, and the second annual meeting was held at the same place in April, 1915. Under the articles of association it is provided that John Hood shall be the first director of the company (article 75). Article 80 provides that the number of the directors is to be such as general meetings shall from time to time direct.

The case is a typical one of a business built up by the ability and industry of one man, and when it has attained a certain

K. B. Div. degree of success, converted into a joint-stock company, registered
 1917. with limited liability under the Companies Acts. In such a case
 Hood & Co. it is usual to entrust the control and management of the new
 v. company in the first instance to the man by whom the business
 MAGEE. was created. But this control is in its nature temporary. The
 Madden J. founder of the firm may from age or other reasons cease to hold
 the position of sole director, in which case he will ordinarily be
 succeeded by a board of directors appointed by the shareholders
 at a general meeting of the company. John Hood, in whom the
 powers of the directorate are vested, is at the present moment
 resident in New York; but his residence there does not result
 from anything in the constitution of the company, or necessarily
 follow from the nature of the business carried on by it. This
 business consists in the purchase in Ireland and Scotland, mainly
 in Ireland, of linen goods, principally damask, which are bleached
 and finished by firms other than the appellants', and then folded
 by hand in the Belfast warehouse of the company. They are sold
 by the sole director, Mr. Hood, in America; but the remaining
 portion of the business is carried on in the United Kingdom.
 The shareholders, by re-electing Mr. Hood, have acted on
 the belief that it is in the interest of the company that the
 managing director should reside where the goods in which they
 trade are sold, rather than where they are manufactured and
 bought. But this arrangement might be departed from. In my
 opinion the residence of the sole director, John Hood, in New
 York is not the kind of residence of a directorate which can be
 relied on as determining the residence of the company for the
 purpose of taxation, and here lies the essential difference between
 the present case and the *De Beers Case* (1).

The judgment of Lord Loreburn L.C. in that case is relied on
 by the appellant company as affording a test of residence which,
 when applied to the present case, leads to the conclusion that
 the company is resident in New York. "In applying the con-
 ception of residence to a company," Lord Loreburn says (2), "We
 ought, I think, to proceed as nearly as we can upon the analogy
 of an individual. A company cannot eat or sleep, but it can

(1) [1906] A. C. 455.

(2) At p. 458.

keep house and do business. We ought, therefore, to see where it really keeps house and does business." Having referred to decisions which adopted the principle that a company resides for the purpose of income where its real business is carried on, he adds, "I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

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Applying the test supplied by Lord Loreburn, I ask in the first instance where does this company keep house? Assuredly in Belfast, for here the registered office must be, under the provisions of the Memorandum of Association, and here the general meetings of the company are in fact held. Where does it do business? Some of the business transactions are carried on in Ireland and some in New York, and this divided business leaves unsolved the question which Lord Loreburn regards as the true test as to where the real business is carried on. This, he says, is where the central management and control actually abides.

In my opinion the central management and control of this company abides with the general meeting of shareholders in Belfast, where the registered office of the company is situated and where the general meetings of the company are held. In the *De Beers Case* (1) the control of the company abided, not in the general meetings, which were held in Kimberley, but in three life-governors and sixteen ordinary directors. Of the ordinary directors four necessarily resided in England. Two of the three life-governors and nine of the sixteen ordinary directors in fact resided in the United Kingdom. The House of Lords, affirming the decision of the Court of Appeal, held that the real control of the company rested with the directorate, the residence of which determined the residence of the company. The relation of this directorate to the company, and the circumstances of their residence in England are widely different from those in the case of Mr. Hood. If the shareholders in general meeting were to consider it more in the interests of the company that the managing director should reside where the goods in which they deal are manufactured and bought, they might refuse to re-elect him, except on the terms of his residing in Belfast. Adopting the

(1) [1906] A. C. 455.

K. B. Div. analogy suggested by Lord Loreburn, the movement would proceed
 1917. from the heart and brain of the organization in Belfast by which
Hoob & Co. the action of its organs is controlled. The importance of this kind
v. of control appears from some observations in the judgment of Lord
MAGEE. Parker in *The Daimler Company Case* (1). The question in that
Madden J. case was as to the enemy character of a company, in regard to
 which the question of the residence of the company was material.
 In considering this question of control, Lord Parker having stated
 that the acts done within the scope of their authority by the
 "company's organs—its directors, managers, and secretary, and
 so forth," are the acts of the company, adds "It seems to me that,
 similarly, the character of those who can make and unmake those
 officers, dictate their conduct mediately or immediately, prescribe
 their duties and call them to account, may also be material in a
 question of the enemy character of the company." These words
 are applicable to the character of the control possessed by the
 general meeting of shareholders over the managing director
 of the appellant company, and go far to support the conclusion
 that the residence of the company is to be determined not by the
 place of abode for the time being of its managing director, but by
 the place where the company permanently keeps house, where it
 can make and unmake its officers, including its managing director,
 prescribe their duties, including the place of their residence, and call
 them to account. For these reasons I think that the appeal fails.

KENNY J. :—

The second section of the Income Tax Act of 1853 (16 & 17
 Vict. c. 34) deals with two potential income-tax payers—the
 resident in the United Kingdom and the non-resident.

A resident in the United Kingdom is liable for income tax in
 respect of the profits from any trade, no matter where the latter
 may be carried on, whether in the United Kingdom or elsewhere,
 while a non-resident in the United Kingdom is liable for income-
 tax only in respect of the profits of a trade carried on in the
 United Kingdom. The Property Tax Act of 1842 (5 & 6 Vict. c. 35),
 which is incorporated in the Act of 1853, contains provisions (see
 sects. 1 and 99 and Schedule D) for the manner of assessing the

(1) [1916] 2 A. C., at p. 340.

profits, to which it is not necessary to refer, the only question which we have to consider being whether this company must be regarded as resident in the United Kingdom within the terms of the Act of 1853.

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The company was registered in Ireland as a limited liability company in January, 1913. It is stated to have been also registered in America. Its registered office is in Ireland, and its principal business consists (as found by the special case) of sales in the United States of America of linen goods, mainly damask, which are purchased in Ireland and Scotland, subsequently bleached and finished by other firms, and then folded by hand in the warehouse of the company in Belfast. Ninety per cent. of such finished goods are sent to New York, where they are sold under the direction of Mr. John Hood, the sole director of the company. The secretary and local representative in this country of the company is Mr. M'Ilroy, and he effects the purchases in this country of the unbleached and unfinished article, and personally superintends the processes of bleaching and finishing and the subsequent despatch of the linen to America. He makes these purchases in accordance, as a general rule, with specific instructions from New York, but is occasionally given a discretion as to price and quantity. Mr. M'Ilroy, as representative of the company, also sells in this country, with Mr. Hood's approval, certain imperfect remnants of the linen, and also—to private friends—small quantities of household linen; but these sales in Ireland form a very small percentage of the company's profits. Some goods have also, in order to save freight, been despatched direct to English agents of traders in the United States; but in such cases the goods were ordered through the New York office, though paid for at the Belfast office. The general management of the company is, according to the articles of association, vested in the board of directors, the number of whom are to be such as general meetings shall from time to time direct, and the directors are to meet for the despatch of business at such times and places as they think fit; and if there be only one director, he is to have all the powers of the board. The company have bankers in Belfast and New York; the account with the former being for the convenience of paying for the goods purchased in Ireland and Scotland, the bulk

K. B. Div. of the moneys paid into it being remitted from New York.
 1917. Cheques on that account can be drawn by a director or by Mr.
Hood & Co. M'Ilroy. The present sole director of the company is Mr. John
v. Hood, who is an American citizen ordinarily resident in the United
MAGRE. States. He draws all cheques on the New York bank, and the
Kenny J. business is carried on both in the United Kingdom and America,
 subject to his instructions and approval as such director.

The accounts of the Belfast office are audited at Belfast by Mr. Shanks, the Company's auditor in Ireland, whose report of 20th February, 1914, states that he has amalgamated with the Belfast accounts "the audited and certified New York accounts," and that the amalgamated balance-sheet is correct. The directors have power to fix the times and places not alone of their own meetings, but of the general meetings of the company. The latter have invariably been held in Belfast, with Mr. Hood presiding, of which directors' meetings in the years 1913, 1914, and 1915, I find that the minutes of six were signed in Belfast and only two in New York. Mr. Hood appears to have signed them all, and it is not unimportant that the minutes of the New York meetings were transmitted to Belfast for entry in the books of the company. Dividends on the company's capital were in the ordinary way declared at the general meetings so held in Belfast, and up to the general meeting of the 16th April, 1916, were paid, as to New York shareholders from the New York office, and as to Belfast shareholders from the Belfast office. This course was altered by resolution of the general meeting just referred to, when it was decided that all dividends were to be paid direct from New York to each individual shareholder.

In the foregoing circumstances can it be said, having regard to the authorities, that, for income-tax purposes, this company's business or trading is carried on in America so as to give the company the character of being resident there, or do the facts point to a residence in the United Kingdom? A great number of cases have been referred to in argument, but I do not think there is one which can be regarded as at all similar in its facts to the present; certainly, there is no one that can be said to be identical. Some are decisive as to the relevance or weight of some one or more of the characteristics of this case in determining

residence and the carrying on of trade, but none presents a combination such as we have here. The test of residence is afforded by the answer to the questions—Where is the seat of government of the company's affairs? Where is the real control of these affairs exercised? The test of residence is not where the company is registered, but where it keeps house and does its real business; and the real business is carried on where the central management and control actually abides: *De Beers' Consolidated Mines, Limited, v. Howe* (1). The House of Lords has also decided in that case that whether any particular case falls within that rule is a pure question of fact to be determined on a scrutiny of the course of business or trading. In that case, notwithstanding that the company was a colonial one and had its head office in Kimberley, and that its general meetings were held there, the House of Lords held that the company was resident in the United Kingdom and exercised its trade there. The considerations inducing that decision were, that the meetings of the directors took place in London as well as in Kimberley, that the majority of the directors who controlled the business were in England, and that the real business of the company was conducted in London in concert with Kimberley.

I do not think there is a single case out of the many that have been cited that differs in principle from the conclusion at which we have arrived, always bearing in mind that the question is one of a fair and legitimate inference from facts, and that the decision of the Commissioners ought not to be disturbed unless we are satisfied they drew a wrong inference. In *Sulley v. The Attorney-General* (2), which was much relied on for the company, goods were bought in the United Kingdom, and the sales took place in America; but the case was decided on the ground that the profits of the company did not come from the purchases, but from the sales, and the mere fact of buying in the United Kingdom and selling in America would not of itself have been sufficient to establish exemption. In the *San Paulo Case* (3) the company was registered both in the United Kingdom and in Brazil. The business was carried on partly in the one country and

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(1) [1906] A. C. 455. (2) 5 H. & N. 711. (3) [1896] A. C. 31.

K. B. Div. partly in the other; the meetings of the company were held
 1917. in England; the business was managed, in the sense of being
Hood & Co. controlled, by directors in England; and the company was held to
 be liable. *MAGEE.* *Grainger v. Gough* (1), where the exemption was upheld,
 can be distinguished on the ground that the merchant was a
Kenny J. foreign one; all contracts with customers were made abroad;
 there was no stock of goods in England, and all deliveries were
 direct from abroad. It was obviously a foreign trading, with
 exclusively foreign control. Almost the last case in which this
 question has been discussed is the *Egyptian Hotels Co.* (2). The
 company was registered in England, and was managed in Egypt
 by a local board specially appointed for the purpose. The London
 board kept the accounts, recommended dividends, and controlled
 the capital; and the Commissioners of Income Tax, in these
 circumstances, held that the controlling power remained with the
 London board. Their determination was affirmed by Horridge J.
 He was reversed by the Court of Appeal, and the House of Lords
 were equally divided, and, accordingly, the judgment of the Court
 of Appeal stood.

It seems to me that the combination of circumstances in the
 case before us is stronger than any to be found in the authorities
 that have been cited. The company is registered in the United
 Kingdom; the general meetings of the company, and the majority
 of the directors' meetings, take place in Ireland; the accounts are
 audited in Ireland, in conjunction with those in New York;
 dividends are declared in Belfast, where the company has a ware-
 house, from which some deliveries, though perhaps not of an
 extensive character, are made; it has a Belfast Branch, on which
 its secretary, Mr. M'Ilroy, draws for payment of goods; and,
 finally, its trade of purchasing, bleaching, and finishing the raw
 material for its linens is all conducted in the United Kingdom.
 As against the inference which might be drawn from these
 circumstances, there is no doubt that the substantial part of the
 sales takes place in America, under the guidance of Mr. Hood,
 and, consequently, the moneys representing profits are taken in
 America. The cheques for dividends are drawn and transmitted

(1) [1896] A. C. 325.

(2) [1914] 3 K. B. 118.

from New York; and, above all, Mr. Hood resides in New York, and personally superintends the work of the department there.

Setting one set of facts against the other, I am of opinion that the real seat of government is in Belfast, and that the business and trading is controlled from the United Kingdom. It is a mere accident that Mr. Hood resides in New York. The business, as carried on in the two countries, is a single entity, and Mr. Hood is no more than a servant or agent of the company temporarily and accidentally resident in the United States. The company, in general meeting, could supersede him at any time and appoint a board, any one or more of whom might reside in the United Kingdom. If he died or became bankrupt, a new board would have to be appointed.

In my opinion the real trading and control for the purposes of the Income Tax Acts is in the United Kingdom, and the company must be regarded as resident there.

Solicitors for the plaintiffs: *Carson & M'Dowell.*

Solicitor for the defendant: *Richard Martin.*

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THE CLONES ELECTRIC LIGHT AND POWER
COMPANY, LTD., APPELLANTS, v. THE COMMIS-
SIONER OF VALUATION OF IRELAND (1).

Revenue—Valuation—Electric light undertaking—Valuation on “revenue” or “profit”—Method of dealing with machinery not erected or used for the production of motor power—Annual Revision of Rateable Property (Ireland) Amendment Act, 1860 (23 Vict. c. 4).

Assuming that the “revenue” or “profit” method of assessment can be correctly applied in estimating the valuation of an undertaking such as an electric lighting undertaking, machinery not erected or used for the purpose of producing motive power should be treated as tenants’ capital, and not as property in respect of which allowance should be made as property of the hypothetical landlord.

CASE STATED, under sect. 10 of the Annual Revision of Rateable Property (Ireland) Act, 1860 (23 Vict. c. 4), by His Honour William J. Johnston, County Court Judge of the county of Monaghan.

The case was stated at the request of the Commissioner of Valuation, who was dissatisfied with a decision of the court of quarter sessions of the county of Monaghan, given on the 18th January, 1917, whereby the revised valuation of the undertaking of the Clones Electric Light and Power Company, Limited, was reduced from £100 to £75.

The matter came before the quarter sessions on October 18th, 1916, by way of appeal by the Clones Electric Light and Power Company against the revised valuation of £100 (including £20 on the company’s power station), assessed by the Commissioner of Valuation on the company’s electric lighting and power undertaking, on the 26th June, 1916.

The method of the assessment was what was called the “revenue or profit method,” and was thus described at the hearing at the quarter sessions by a witness for the Commissioner.

(1) Before GIBSON and MADDEN JJ.

"From the company's revenue account the amount of the net receipts is obtained. The rates are not dealt with until later. The following deductions are made from the net receipts—(a) an annual sinking fund for the ultimate renewal of the property by the landlord; (b) allowance on the capital of the tenant invested in the undertaking; (c) rates on the revised valuation; (d) a sum to make the valuation relative to others in the district, i.e., lands and buildings. The result is the rateable valuation, and, when the normal valuation of the buildings has been deducted therefrom, the balance is placed on the rights and easements."

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It was proved that the Clones undertaking consisted of the power station and the leasehold interest in the lands on which it stood, the mains and lands occupied by them, the posts and wires suspended therefrom, and attached by bolts and brackets to convenient roofs and chimneys, the incorporeal right of laying down pipes and mains, placing posts in the streets of Clones, and fixing wires to roofs and chimneys, and a 112-horse-power gas engine, and a 40-horse-power oil engine in the power station, which supplied the motive power for the carrying on of the undertaking. The other machinery in the power station consisted of accumulators, dynamos, switchboard, and belting.

The company's revenue account for the period ending the 30th November, 1915, showed a net profit of £321. From this net sum the following deductions were made on the method of assessment above referred to—(a) "landlord's allowances" (sinking fund, at $3\frac{1}{2}$ per cent., scrap value, 10 per cent.) on buildings, mains, free wiring, poles, brackets, switchboard, shafting, engines, and boilers, dynamos, motors, and accumulators, £65; (b) allowances on the tenant's capital; "tenant's allowances" on "present value" of meters, lamps, and stores at $15\frac{1}{2}$ per cent., £62; on floating capital of £200 at $15\frac{1}{2}$ per cent., £31; total "tenant's allowance," £93; (c) rates at 7s. in the pound, £35 14s.; (d) 20 per cent. "to make relative," £25 9s. These deductions left a balance of £102 in round figures on which the Commissioner fixed the valuation at £100, placing £25 on the buildings, and the balance, £75, on the rights and easements. The Clones Electric Lighting and Power Company appealed from this assessment, on the ground that it was excessive.

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The appeal was heard by His Honour on the 18th October, 1916. Judgment was reserved and given on the 18th January, 1917. By his judgment His Honour, though adopting the revenue or profit method of valuation, reduced the assessment from £100 to £75, apportioning £25 on the buildings, and £50 on the rights and easements. His Honour made the following changes in the figures of the Commissioner's assessment: He held that the dynamos, accumulators, switchboard, shafting, and electrical instruments were not machinery erected and used for the production of motive power, but should be regarded as non-rateable property, and that an allowance in respect of the "present value" of this machinery should be made as part of the "tenant's allowances"; but that the 112-horse-power gas engine, and 40-horse-power oil engine, being machinery erected and used for the production of motive power, were properly included in the items on which the allowances for sinking fund and scrap value as landlord's property should be made. His Honour adopted the rate of $3\frac{1}{2}$ per cent. for landlord's allowances, but held that 15 per cent. was a sufficient rate for present value of the tenant's fixed capital, and 10 per cent. for the tenant's floating capital, taking the floating capital at £200. These alterations resulted in increasing the "tenant's allowances" to £160 instead of £93, and in decreasing the "landlord's allowances" from £65 to £42. His Honour took the amount to be allowed for rates at 8s. instead of at 7s. in the pound, and in other respects adopted the figures of the Commissioner's assessment. The net sum resulting on the figures of His Honour was the sum of £71. which he increased to £75, as the valuation of the company's undertaking.

The question stated in the case for the opinion of the Court was as follows:—

(a) "Assuming it to be a question of law and not of fact, was I right in holding that the accumulators, dynamos, switch-board, and shafting and electrical instruments were not machinery for the production of motive power?

(b) "Was I right in eliminating the present value of that machinery from the calculation as to 'landlord's allowances,' and treating that value as part of the tenant's capital in respect of which 'tenant's allowances' should be made?"

The following are the material portions of the statutes referred to in the arguments and judgment:—

K. B. Div.
1917.

The Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), s. 64: "And be it enacted that every such rate shall be a poundage rate made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, the rent at which one year with another the same might in their actual state be reasonably expected to let from year to year, the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the hereditaments in their actual state, all rates, taxes, and public charges, if any, except tithes, being paid by the tenant."

CLONES
ELECTRIC
LIGHT CO.
v.
COMMISSIONERS OF
VALUATION.

The Annual Revision of Rateable Property (Ireland) Amendment Act, 1860 (23 Vict. c. 4), sect. 7. In making the valuation of any mill or manufactory, or building erected or used for any such purpose, the Commissioner of Valuation shall in each case value the water or other motive power thereof, but shall not take into account the value of any machinery therein, save only such as shall be erected and used for the production of motive power.

J. M. Fitzgerald (with him *Carrigan K.C.*, and *M'Elligott K.C.*) for the appellant, admitted that the first question submitted for the opinion of the Court was a question of fact with which the Court could not deal.

Pringle and Wylie K.C., for the respondents.

GIBSON J.:—

This comes before us on a case stated, and we are bound by all the findings of fact, unless there was no evidence on which those findings could be based, which has not been argued.

Only two questions were reserved by the case, and the first of these having been abandoned by counsel only one question remains for our decision—namely, whether the landlord is entitled to any allowance in respect of the non-motive power machinery, having regard to the provisions of sec. 7 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, 33 Vict. c. 4, on the same lines as 15 & 16 Vict. c. 63, sec. 13, considered in *M'Master's Case* (1).

K. B. Div.

1917.

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VALUATION.

Gibson J.

I cannot approve of the method of valuation adopted by the parties on which the judge was asked to decide. The judge dealt with the formula or basis of valuation brought before him, and we must now act on the same footing. Where machinery is of two species, one rateable and the other not, and such machinery is worked as one integer, each part being incapable of earning profit by itself, the application of the profit test to valuation is open to manifest objection. Apart from such objection founded on sec. 7, the mode of valuation adopted was one which has been characterized by Lord Halsbury as dangerous. The problem before the learned County Court Judge under sec. 64 of the Poor Law Act, 1838, 1 & 2 Vict. c. 56, was what was the rent at which the premises "one year with another might in their actual state be reasonably expected to let from year to year, the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the hereditaments in their actual state, all rates, taxes, and public charges, if any, being paid by the tenant." As to that problem Lord Halsbury, in his speech in *Mersey Docks Harbour Board v. Birkenhead Assessment Committee* (1), says:—"You are to rate—what? Not the tenant's trade. I will deal presently with some questions, and see how they arise with reference to whether you are entitled to go into the question of profit and loss. The trade is excluded from valuation by the terms of the statute. You are to rate the premises according to their value; therefore, it would be very wrong, indeed, to rate the trade, or to treat it as you would if you were dealing with the question of income tax. You are not rating the income, you are rating the premises; so that where you have premises of a similar character, with equal facilities for carrying on trade, you have a very facile mode of coming to the conclusion what sum would reasonably be given by any tenant from year to year for such premises. But if instead of doing that you choose to go into elaborate calculations of how much the building cost to erect, and when erected what would be the value of it, you are only elaborating and making more complex the simple proposition which the Legislature has put before the overseers to answer."

(1) [1901] A. C. 175, at p. 180.

As I endeavoured to point out in *Armstrong v. Commissioner of Valuation* (1), mere profits for a year are not to be used as governing the annual value from year to year. What the Court has to consider is the hypothetical rent. The earning capacity may vary; it is the stability of profits as continuing that affects the annual value of the hereditament. Here the profits of only one year were taken—hardly a safe foundation for assessing value one year with another.

K. B. Div.
1917.
CLONES
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VALUATION.
Gibson J.

The learned County Court Judge had not the assistance of counsel. The first and main difficulty is sect. 7 of the Act of 1860 (23 Vict. c. 4), which provides:—"In making the valuation of any mill or manufactory, or building erected or used for any such purpose, the Commissioner of Valuation shall in each case value the water or other motive power thereof, but shall not take into account the value of any machinery therein, save only such as shall be erected and used for the production of motive power."

If regard is had to sect. 64 of the Poor Law Act, 1838, there is no real difficulty in applying the provisions of sect. 7 of the Act of 1860; but the moment the provisions of sect. 64 of the former statute are thrown overboard and a new mode of valuation adopted based on aggregate profits from the hereditament, with its entire machinery, motive or non-motive, how is sect. 7 to be applied? The difficulty in this case has been caused by the confusion arising from two dissimilar modes of valuation. Sect. 7 of the Act of 1860 says that certain kinds of machinery must be eliminated. Supposing the non-motive power machinery is eliminated, the value could be assessed without regard to that machinery; but on the basis of profits the whole business as a single integer must be considered; and, therefore, all the machinery must enter into the calculation. The mode adopted before the learned County Court Judge might result in putting aside the protection afforded by sect. 7 of the statute of 1860.

Supposing that the method of valuation described in sect. 64 of the Poor Law Act is put away and replaced by the method of valuing on profits, how are the profits of a particular year to be ascertained? As was stated in the judgments in *Mersey Docks and*

(1) [1905] 2 I. R. 448, at p. 480.

K. B. Div: Harbour Board v. Birkenhead Assessment Committee (1), and *Armstrong v. Commissioner of Valuation* (2), you are quite at liberty to consider the average profits in a general way to ascertain the earning capacity, but you cannot determine value by a book-keeping account for a particular year. A number of the questions argued were on matters of fact with respect to which we have no jurisdiction to interfere. The only question proposed for decision is whether on the method adopted the landlord is entitled to any allowance in respect of the non-motive power machinery. In my opinion, non-motive machinery was by the statute excluded from valuation, and the conclusion of the judge that in the method of valuation proposed before him no allowance for such machinery should be made to the landlord was correct.

MADDEN J. concurred.

The following order was made by the Court :—

It is ordered as follows :—(a) Counsel for the Commissioner of Valuation admitting that the matter referred to is a question of fact not within the jurisdiction of this Court, the question is one which the Court does not answer. (b) The parties having consented to value being ascertained by reference to profit, the Court, without expressing any opinion as to the propriety or applicability of such principle, answers this question affirmatively, having regard to such above consent.

C. N. K.

1918. The Commissioners of Valuation appealed to the Court of
Jan. 15, 18. Appeal.

The Court (3) held that there was no question but one of fact in the case, which was entirely within the jurisdiction of the County Court Judge, and affirmed the decision of the King's Bench Division without expressing any opinion upon the observations of Gibson J. in relation to the principle of valuation which had been applied.

Solicitor for the appellant : *The Treasury Solicitor*.

Solicitor for the respondents : *W. F. McCoy*.

R. ST. J. C.

(1) [1901] A. C. 175.

(2) [1901] 2 I. R. 448.

(3) Before SIR IGNATIUS J. O'BRIEN C., RONAN and MOLONY L.JJ.

McCLELLAND, APPELLANT; BRADY, RESPONDENT (1).

K. B. Div.
1917.Oct. 30.
Nov. 7.

Justices—Jurisdiction—Petty Sessions—Trivial offence—Extenuating circumstances—Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1, sub-s. 1—Conditions therein alternative not cumulative—Decision of individual justices based on different grounds—Defence of the Realm Regulation 9E.

A defendant was charged at Petty Sessions with having taken part in exercise and drill of a military nature in contravention of the Defence of the Realm Regulation 9E. The evidence for the prosecution was not contradicted, and no evidence was given for the defence. The Court, which consisted of three justices, differed in its conclusion; one justice being of opinion that the charge was proved, and that the defendant should be convicted; one justice found that the defendant took part in military evolutions of some kind, but dismissed the charge as being trivial; and the remaining justice concurred in dismissing the charge, but upon the ground "that the members of the procession were doing nothing more on this occasion than others had done before and after the date charged." Accordingly, the case was dismissed on the merits by the majority of the Court. *Held*, that there were no facts in evidence before the justices entitling them to hold that the offence, which was a serious one, was in the particular case trivial in its character.

Held also (assuming but not deciding that failure on the part of the Executive to prosecute other persons in *pari delicto*, or discrimination in favour of others who had committed the same offence in an aggravated form, might entitle a Court of summary jurisdiction in pursuance of s. 1 of the Probation of Offenders Act, 1907, to dismiss a charge on the ground either of extenuating circumstances *per se*, or that by reason of such circumstances the offence was trivial in its nature), inasmuch as no evidence of such failure or discrimination had been given at the hearing, that the justice, in having regard to such matters *ex informata conscientia*, was acting without and in excess of jurisdiction.

Held also, that the three conditions upon which the exercise of the jurisdiction conferred by s. 1 of the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), is made to depend are alternative and not cumulative.

Held also, that where it is open to justices to dismiss a complaint upon any one or more of several grounds, their decision to dismiss is not necessarily vitiated merely by the fact that the justices in so deciding do so upon different grounds, provided that there were facts in evidence before them to justify their individual conclusions.

(1) Before SIR JAMES CAMPBELL C.J., and MADDEN and DODD JJ.

K. B. Div. CASE STATED by justices, pursuant to the Summary Jurisdiction
1917. Act, 1857 (20 & 21 Vict. c. 43).

McCLELLAND

v.

BRADY.

At a Petty Sessions, holden at Tomgraney, Co. Clare, on the 25th July, 1917, one John Brady was charged with having, on the 17th May, 1917, at Tomgraney, unlawfully and without legal authority, and in contravention of the Defence of the Realm Regulation 9E, and the Order made thereunder, dated the 27th November, 1916, taken part in exercise and drill of a military nature.

The facts proved at the hearing were stated in the case as follows:—

"1. It was proved by the evidence of Sergeant Treacy and other police witnesses that at or about 11.30 p.m. on the night of the 17th of May, 1917, a body of about twenty young men marched through the village of Tomgraney. They were marching in two-deep formation, with one man in front, and three or four men marching at intervals singly on the left-hand side in the position of sectional commanders. They marched about fifty yards outside the village, on the road to Scariff; at this point a voice from the body called out, 'Left wheel,' 'by the right,' at which the party turned and marched back by the same route through the village in the direction from which they had come, viz., the ball-alley at the opposite end of Tomgraney village. One of the party was playing a concertina or melodeon.

"2. About ten minutes after this Sergeant Treacy, still standing in the same place, heard a voice call out from the opposite side of Tomgraney, 'Right wheel,' and, looking in that direction, saw about forty men or boys coming from the direction of the Bodyke road, and marching past him through the village. Whether this was the same party augmented, or a different party he could not say; but these were also marching in two-deep formation, with a number of men marching singly at intervals on the left-hand side of the body, and in the position which sectional commanders usually occupy. This body also marched out of the village for about fifty yards on the road to Scariff, and when it reached this point a voice called out, 'Halt,' and immediately afterwards called out, 'Right wheel.' The party having turned, a voice called out, 'Forward,' whereupon the party marched back

in the same direction through the village as the first party marched. Sergeant Treacy identified the defendant, John Brady, as being in this party, so marching, and one of the party.

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1917.
McGILLAND

BRADY.

"3. Sergeant Doherty, R.I.C., Sergeant Law, R.I.C., and Head Constable Kearney, R.I.C., also gave evidence as to the marching of the bodies two-deep, and Sergeant Doherty as to hearing words of command from them. And whereas the complainant put in evidence and relied on the Order of the Chief Secretary to the Lord Lieutenant, dated the 28th of November, 1916, and published in the *Dublin Gazette* of the same date, putting in force in Ireland Regulation 9e of the Defence of the Realm Regulations, and the Order, dated the 28th of May, 1917, of Major-General Doran, the Competent Military Authority, referring this case for adjudication to the court of summary jurisdiction for the district. And whereas the evidence given for the prosecution was not contradicted, and no evidence was given for the defence, the solicitor for the defendant merely stating that it was a ridiculous case, having regard to the fact that many similar processions led to no prosecutions previously, we gave judgment separately, each of us for himself, as follows:—

"One of us, P. J. Kelly, R.M., found on the evidence that the charge of taking part in military exercises or drill was proved against the defendant, and he convicted the said defendant on the charge of violating the Defence of the Realm Regulation 9e, and the Order made thereunder.

"The second of us, F. C. Sampson, stated that he found that the defendant took part in military evolutions of some kind, but he dismissed the charge against the defendant as being trivial.

"The third member of the Court, J. O'Brien, simply said he dismissed the charge, as 'they were doing nothing more than others had done before and after the date charged.'

"Accordingly the following order was made by the majority of the Court:—

"Dismissed on the merits by the majority of the Court."

The judgment of the Court was sought as to whether the justices were correct in point of law in their determination as aforesaid.

K. B. Div. *Devitt* (with him *Serjeant Sullivan K.C.*), for the appellant:—
1917.

McCLELLAND
v.
BRADY.

We submit that no offence against the Defence of the Realm Regulations can be trivial. Furthermore, the Court cannot decide that the offence is trivial, not from the nature of the offence, but because similar occurrences are taking place every day. The Court has power to review the exercise of discretion by justices under sect. 1 of the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17): see *Phillips v. Evans* (1), which is a decision on the somewhat similar section (sect. 16) of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). If the magistrates come to the conclusion that an offence is trivial, they should take that into consideration in inflicting punishment, and impose a nominal penalty, instead of dismissing the complaint.

Joseph O'Connor, for the respondent:—

Mr. Devitt's argument gives the go-by to the provisions of sect. 1, sub-s. 1, of the Probation of Offenders Act, 1907, which enacts:—"Where any person is charged before a Court of summary jurisdiction . . . and the Court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, without proceeding to conviction, make an order . . . dismissing the information or charge." It is clear from the decision in *Dunning v. Trainer* (2) that the fact that other persons are committing offences similar to that charged against the defendant is an extenuating circumstance within that section, which entitles the justices to dismiss the summons. Can the Court in the present case say that the justices exercised their discretion improperly in dismissing the case? Since the Act of 1907 the King's Bench Division has been very slow to interfere with the exercise by justices of their discretion.

(1) [1896] 1 Q. B. 305.

(2) 25 T. L. R. 658.

[*Serjeant Sullivan* referred to *O'Donoghue v. Morris* (1).] *K. B. Div.*
 Although an offence may be serious in its character, still the 1917.
 particular facts of a particular case may make the particular *McCLELLAND*
 instance of the offence trivial. [He also referred to *Preston v.*
Redfern (2): *Glasgow v. O'Connor* (3).] *B. C. L.*

Serjeant Sullivan, in reply:—

In this case the offence charged is one which in the circumstances given in evidence cannot be considered to be an offence of a trivial nature. If in the circumstances the offence is not trivial, then it would be a contradiction in terms to say that, although the offence proved is not trivial, yet there are extenuating circumstances. If the offence is not trivial, there cannot be extenuating circumstances. The word "offence" in sect. 1 of the Probation of Offenders Act, 1907, means the charge as proved against the individual. The justices do not mention the first branch of sub-s. 1, namely, "character, antecedents, . . . of the person charged." What evidence is there of extenuating circumstances? Even assuming that it was open to the defendant to produce evidence of the extenuating circumstances alleged by him to exist, he did not do so.

Cur. adv. vult.

SIR JAMES CAMPBELL C.J.:—

Nov. 7.

This case has been stated upon the hearing of a complaint by A. V. McClelland, District Inspector, Royal Irish Constabulary, against John Brady, for having, upon the 17th day of May, 1917, at Tomgraney, in the County of Clare, taken part in exercise and drill of a military nature in contravention of the Defence of the Realm Regulation 9E, and the order made thereunder of 23rd November, 1916. The case itself and the arguments which have been addressed to the Court raise considerations of importance affecting the exercise of their jurisdiction and the administration of the law by local justices in dealing at Petty Sessions under their summary jurisdiction with criminal offences, and with a view to their guidance and assistance I propose to discuss these considerations with fulness and care. Unauthorized drilling by

(1) Unreported, 24th February, 1914, K. B. D., Pallett C.B., and Dodd J.

(2) 76 J. P. 359.

(3) 45 I. L. T. R. 5.

K. B. Div. civilians has been illegal in this country, as the result of legisla-
 1917. tion, since the year 1819; but the Defence of the Realm
McClelland Regulation 9E is wider in its application, and prohibits all
Brady. except members of His Majesty's naval and military forces, or
Sir James constables, from practising, taking part in, or being concerned in
Campbell C.J. any exercise, movement, evolution, or drill of a military character.
 It consequently deprives the local justices of the power which
 they possessed under the Illegal Drilling Act of 1819 (60 Geo. 3
 and 1 Geo. 4, c. 1), of granting permits under certain conditions
 for such purposes.

This particular Regulation was by order of the Chief Secretary,
 dated November 28th, 1916, declared to be in force throughout
 Ireland. In the particular case now before this Court the facts
 proved in support of the complaint were in substance as follows:—
 About 11.30 p.m., upon the night of the 17th of May, 1917, a
 body of about twenty young men marched two deep to and fro
 through the village of Tomgraney, with one man in front and
 others marching at intervals singly on the left-hand side of the
 main body in the apparent position of sectional officers. One of
 the party was accompanying the march with music from some
 form of instrument, and words of command, such as “left wheel,”
 “by the right,” were issued from time to time. A little later
 either the same party, now augmented to about forty, or another
 and different party, marched in the same way and under similar
 words of command through the village and back again; and
 evidence was given identifying the defendant John Brady as a
 member of this second party and as participating in the march.
 Formal proof was also given of the order of 28th November, 1916,
 and of an order by the competent military authority, dated
 28th May, 1917, referring the case to a Court of summary
 jurisdiction pursuant to the Defence of the Realm Regulations.
 The case then states:—“The evidence for the prosecution was not
 contradicted, and no evidence was given for the defence”; while
 the solicitor for the defendant confined himself to the observation
 that it was “a ridiculous case, having regard to the fact that many
 similar processions led to no prosecutions previously.” The
 Court, which consisted of the resident magistrate and two local
 justices, differed in its conclusion, the resident magistrate being

of opinion that the charge was proved, and that the defendant should be convicted; while one of the two local justices found that the defendant took part in military evolutions of some kind, but dismissed the charge as being trivial, and the other concurred in dismissing the charge, but upon the different ground "that the members of the procession were doing nothing more on this occasion than others had done before and after the date charged." In the result, the following order was made:—"Dismissed on the merits by the majority of the Court"; and at the request of the complainant the justices stated a case for the opinion of this Court as to whether they were correct in point of law in their determination.

K. B. Div.
1917.
McCLELLAND
v.
Baker.
Sir James
Campbell C.J.

Though it is not so stated in the case, I think we must assume, and indeed the whole argument before us has proceeded upon that assumption, that the justices who concurred in dismissing the complaint did so in the belief that the case came within the provisions of the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), sect. 1, which reads as follows:—"Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—(1) dismissing the information or charge; or (2) discharging the offender conditionally on his entering into a recognizance," &c.

We are clearly of opinion that there is nothing in the Defence of the Realm Regulations to deprive a court of summary jurisdiction to which the competent military or naval authority has referred any charge for breach of any regulation of the right to apply in the determination of it the above provisions of the Probation of Offenders Act, provided always the materials exist either in the character of the offence itself or in the facts established in evidence before them which entitle them to apply it. Once it is referred to them it becomes for all intents and purposes subject

K. B. Div. to the provisions of this statute as well as of all others which
 1917. regulate or control their jurisdiction while acting as a court of
 McCLELLAND summary jurisdiction, but, as was conceded in argument, it is
 v. equally clear as the result of many decisions that upon the hearing
 BRADY. of any case stated by them for this Court, in which presumably
 Sir James of any case stated by them for this Court, in which presumably
 Campbell C.J. they have, in accordance with their duty, set out all the material
 facts that were in evidence before them, it is the right and
 province of this Court to decide whether, in the circumstances of
 the particular case, they, in applying the provisions of the Probation
 of Offenders Act, acted within or without their jurisdiction.

In the case now before us it was contended on behalf of the Crown that the three conditions—1, the character, age, health, &c., of the person charged; 2, the trivial nature of the offence, and 3, the extenuating circumstances in which the offence was committed, upon which the exercise of the jurisdiction conferred under sect. 1 of the Probation of Offenders Act, 1907, is made to depend—are cumulative and not alternative, or, in other words, that the word “or,” with which conditions 2 and 3 are prefaced, should be read as “and.” If this contention is sound, it is plain that the decision of the majority of the justices in this case cannot stand, because neither calls in aid condition 1, while one relies upon condition 2 alone, and the other bases his decision, presumably, upon condition 3 alone. We are, however, of opinion that this contention on the part of the Crown is not sustainable, and a short review of the history of the legislation upon the subject will demonstrate its unsoundness. It has its origin in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), sect. 16, which provides as follows:—“If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the court of summary jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment, the Court, without proceeding to conviction, may dismiss the information.” This Act applied to England only, but in 1887 the Probation of First Offenders Act, 1887 (50 & 51 Vict. c. 25), was passed and made applicable to the United Kingdom, and, by sect. 1, it was enacted that, in the case of certain offences, the

convicted person may be released upon probation, "if it appears to the Court before whom he is convicted that, regard being had to the youth, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance," &c. It will be noticed that by this section the exercise of the jurisdiction is made to depend upon the same conditions in effect as those contained in sect. 1 of the Probation of Offenders Act, 1907, but with this distinction, that condition 2 is not prefaced by either "and" or "or," while condition 3 is prefaced by "and," so that *prima facie* they should be construed as cumulative, and not alternative; but this construction seems to be at variance with the preamble of the Act, which reads as follows:—"Whereas it is expedient to make provision for cases where the reformation of persons convicted of first offences may, by reason of the offender's youth or the trivial nature of the offence, be brought about without punishment: Be it therefore enacted," &c.

K. B. Div.
1917.
McLELLAND
BROOKLYN.
Sir James
Campbell C.J.

I have been unable to find any decision of authority in this country upon this question of the construction to be given to this section of the Act of 1887, while in England the question does not seem to have arisen, as the justices seem invariably to have acted under sect. 16 of the Summary Jurisdiction Act, 1879.

But the question has, in our opinion, been finally disposed of by the Probation of Offenders Act, 1907, which is now the governing Act for the whole United Kingdom, because it not only repeals sect. 16 of the Act of 1879, and the entire of the Probation of First Offenders Act, 1887, but also in sect. 1 deliberately rejects the use of the word "and," and prefaces conditions 2 and 3 with the word "or." We are therefore of opinion that the conditions in this section must be construed as alternative.

It has also been contended that as the two justices who formed the majority who concurred in dismissing the complaint, did so upon different grounds, one having regard to the trivial nature of the offence, and the other to the extenuating circumstances, there has

K. B. Div. 1917. *McClelland v. Brady*.
 Sir James Campbell C.J. been no valid adjudication of dismissal; but we are of opinion that where it is open to the Court to dismiss a complaint upon any one or more of several grounds, the decision to dismiss is not necessarily vitiated merely by the fact that the justices in so deciding do so upon different grounds, provided always that there were facts in evidence before them to justify their individual conclusions. The finding by one of the majority of the justices that the offence in this case was of a trivial nature has been assailed by the Crown upon two grounds—first, because as was argued, the offence must be trivial per se, and not by reason of the special facts or circumstances of the particular case; or, in other words, that an offence which is serious per se can never be held to be of a trivial nature within the meaning and intent of this section, by reason of any extenuating circumstances in which it was committed; and second, because in any event there was no evidence or proof of the existence of any such circumstances. As to the first of these grounds, we were impressed by the consideration that the language of the section seems to demand that before dismissing a complaint upon the ground that the offence is of a trivial nature, the justices must have regard to the character of the offence per se, wholly disregarding the circumstances of the particular case; upon further investigation, however, I have come to the conclusion that the question cannot be so easily disposed of. In the English case of *Barnard v. Barton* (1) Mr. Justice Kennedy, in dealing with the words “so trifling a nature” in sect. 16 of the Act of 1879, says, at p. 360:—“Now it may be that an offence serious in its nature can be rendered trifling by the circumstances under which it was committed.” Again, in *Glasgow v. O'Connor* (2) the defendant was proved to have suspended a flag from his licensed premises on the occasion of a political meeting in the town, in violation of the Licensing Act, 1836. The justices dismissed the charge, finding that the offence was trivial in its nature. Their decision was overruled in this Court, Palles C.B., in his judgment, stating that the charge was in its nature a serious one, and that in the absence of proof of extenuating circumstances the justices were wrong in dismissing it as an offence

(1) [1906] 1 K. B. 357.

(2) 45 L. L. T. R. 5.

of a trivial nature. It seems to me that in each of these cases *K. B. Div.*
the Court may not have paid sufficient attention to the fact that *1917.*
under sect. 1 of the Act of 1907 the power to find that the *McCLEILAND*
offence was trivial in its nature is distinct from and alternative *v.*
to the power to find that it was committed in extenuating *BREDA.*
circumstances; nor can I quite understand how an offence which *Sir James*
the Court determines to be serious in its nature can at one and the *Campbell C.J.*
same time be found by the same Court to be trivial in its nature.
Any such decision seems to treat these distinct and alternative find-
ings as not only overlapping but apparently as covering precisely the
same ground; and it may well be that upon the true construction
of this section an offence which is serious per se can never be dis-
missed as trivial, though it may be dismissed on the other and
alternative ground, that although serious per se or in its nature,
it was, upon the evidence, committed under extenuating circum-
stances. Such a construction avoids the manifest contradiction in
terms of an offence serious in its nature being at the same time
trivial in its nature, and also provides a fitting subject-matter for
the application of the alternative finding. Accordingly, though we
are agreed in holding that the offence in this case was grave and
serious per se, we abstain from deciding the point as to the juris-
diction of the justices to deem it to be of a trivial nature in a parti-
cular case, or from in any way prejudicing its consideration should
it arise and be essential for decision upon some future occasion,
inasmuch as we are satisfied that even if the justices possessed the
jurisdiction claimed for them, there were no facts of any kind in
evidence before them justifying or entitling them to hold that this
serious offence was in the particular case trivial in its nature. No
attempt was made on the part of the defendant or his solicitor by
cross-examination or direct evidence to account for his participa-
tion in these midnight manœuvres in the County Clare. The case
was allowed to go by default, and we, therefore, have no hesitation
in deciding that it was not open to the justice to come to any
such conclusion.

Our decision upon this point is sufficient for the determination
of the whole case, inasmuch as it nullifies the decision of one of the
two justices who concurred in dismissing the charge; but I think
we should also deal with the arguments that have been addressed

K. B. Div. to us in reference to the finding of the other justice, who, as the 1917. case informs us, dismissed the charge on the ground that the McCLELLAND offenders "were doing nothing more on this occasion than others v. BRADY. had done before and after the date charged." Taken literally, this is nonsense, because it is consistent with the fact that the others Sir James Campbell C.J. referred to by him may have been prosecuted and punished for their offence, but in the light of the statement by the solicitor for the defendant to the effect that many similar processions led to no prosecutions previously, it has been assumed in argument by both sides, and I think rightly, that by this finding the justice had in contemplation the allegation that the other persons he referred to had not been prosecuted, and considered that he was entitled to have regard to this allegation as "an extenuating circumstance." His action in this respect has been challenged by counsel for the Crown on the ground that no consideration of the kind could ever be in point of law an "extenuating circumstance." It certainly seems to be a strong, and perhaps startling, proposition that failure upon the part of the Executive to enforce the law in the case of any particular offence, or class of offences, or any arbitrary discrimination between persons all equally guilty, or even discrimination in favour of those who organize for, or incite to, the commission of the offence, could ever be relied upon as "an extenuating circumstance," entitling the Court in a case in which a prosecution has in fact arisen, and the charge is proved, to discharge the offender under this section even though the Court might well think that such failure or discrimination was dangerous to the public safety, and calculated to expose the administration of justice to derision and contempt. Mr. O'Connor has, however, in this connexion strenuously relied upon the case of *Dunning v. Trainer*, decided in 1909, and reported in 25 Times Law Reports, 658. In that case an information was laid in the name of the Chief Constable of the Liverpool police against the defendant for placing a stall on the footway of a certain street in Liverpool, contrary to the provisions of a local Act. It was proved at the hearing before the justices that the stall projected over the footway some sixteen inches, that in the same street there were other stalls projecting over the footpath, which caused more obstruction than the

respondent's stall, and that no prosecution had been instituted in respect of these other stalls. *K. B. Div.*
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The justices dismissed the information, being of opinion that these facts were "extenuating circumstances under which the offence was committed," but at the request of the prosecution stated a case for the opinion of the King's Bench Division. That court held that there were extenuating circumstances, and that the justices were therefore justified in dismissing the information; and Lord Alverstone C.J. is reported to have said in the course of his judgment, after referring to the facts, "Under these circumstances could they really say that the magistrates, in the exercise of their discretion, might not say that this was an offence of a trivial nature—words which, he thought, ought not to be too narrowly construed? He could not agree that the mere number of cases in which other people were offending was not a material consideration. The offence of the respondent was not the worst of these offences, and as to the latter no attempt had been made to stop them." It is a curious feature of this judgment that while the justices dismissed the charge, having regard to the extenuating circumstances under which the offence was committed, Lord Alverstone, while confirming their decision, appears to deal with it as if it was based on regard to the trivial nature of the offence in the earlier words of the same section; but it is certain that in so treating it he was influenced solely by the same "extenuating circumstances" as those upon which the justices relied for their finding, for if he had been of opinion that the matters relied upon were not "extenuating circumstances," he must have reversed their decision. I find myself unable to avoid the conclusion that this decision is a direct authority in support of Mr. O'Connor's contention that evidence of failure upon the part of the Executive to prosecute other persons in *pari delicto*, or discrimination in favour of others who have committed the same offence in an aggravated form, may entitle a court of summary jurisdiction to dismiss a charge on the ground either of extenuating circumstances *per se*, or that by reason of such circumstances the offence was trivial in nature. This decision, though not binding upon this Court, is of course entitled to respect; and had it been necessary for us to consider and determine in this case a question of such

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K. B. Div. importance, we should have asked for further argument and
 1917. assistance from counsel; but inasmuch as we are all completely
 McCLELLAND satisfied that no evidence of any kind, or anything in the nature
 v. of evidence, of any such failure or discrimination was tendered or
 BRADY. given at the hearing of this complaint, we must and do determine
 Sir James that the justice, in having regard to such matters *ex informata*
 Campbell C.J. conscientia, and in deciding in consequence to dismiss the charge,
 was acting without and in excess of jurisdiction.

We shall therefore remit this case to the justices with our direction that they were not correct in point of law in their determination, and that they should convict the accused.

MADDEN J.:—

I concur, and, so far as I am concerned, I adopt the judgment which has just been delivered by my Lord as the judgment of the Court. But, as the case is of importance, I desire to state the precise ground on which I base my judgment.

In this case there was, in my opinion, no evidence before the magistrates of extenuating circumstances which would justify them in dismissing the charge under the Probation of Offenders Act. There was, in fact, no evidence of any kind beyond proof of the commission of the offence. That proof must be given of the circumstances relied on in any particular case is obvious, and it has been so held by this Court in the case of *Glasgow v. O'Connor* (1).

The offence in the present case was serious in itself and also in the circumstances in which it was committed. The nature of the offence, whether serious or trivial, is a separate consideration under the Probation of Offenders Act, 1907, from the existence of extenuating circumstances as regards any particular offender, but they are closely related. It is obvious that circumstances which might fairly be regarded as extenuating an offence against a local Act providing for the convenience of persons using a public footpath, as was held in *Dunning v. Trainer* (2), would have absolutely no relevance in regard to regulations which were considered to be essential for the defence of the realm in time of war. A wilful

(1) 45 I. L. T. R. 5.

(2) 25 T. L. R. 658.

violation of a regulation of this kind is, in itself, an offence of a most serious character; and in the present case it was clearly proved that regular military evolutions and drilling were deliberately carried out at dead of night, in which a large proportion of the manhood of the village of Tomgraney was engaged. It is not necessary for me to consider in what circumstances, if any, magistrates acting under the Probation of Offenders Act would be justified in absolutely dismissing a charge, proved before them, of participating in such an offence; for in the case before us there is no evidence of anything beyond the actual commission of the offence, and in the absence of proof of extenuating circumstances they cannot be supplied by considerations operating on the mind of the presiding magistrate.

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BRADY.
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Dodd J. concurred.

Solicitor for the appellant: *The Chief Crown Solicitor.*

Solicitor for the respondent: *Hugh O'Brien Moran.*

G. E. H.

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THE "EOLO" (1).

Admiralty—Salvage—Privately owned Vessel—"Requisitioned" by Foreign Government for State purposes—Freedom from arrest—Protest by the Crown.

Where a privately owned vessel is employed under the orders of a sovereign State for the service of the State, she is a requisitioned ship, and as such not liable to arrest.

The Italian steamship "Eolo," having been attacked by a German submarine, was abandoned by her officers and crew. She was subsequently salvaged by the "Mona Leen" and brought to Queenstown, where she was put under arrest at the suit of the salvors. Upon the application of the Italian Consul-General for Ireland, acting on behalf of the Italian Government, representing that the "Eolo" had been requisitioned by the Italian Ministry of Marine, that her owners were paid £40 a day for her services by the Italian Government, that she carried a six-inch gun served by gunners of the Italian Navy, and that she carried material for munitions of war:—

Held, that she was not liable to arrest, and must be discharged forthwith.

Semble, when a claim is made by a foreign power to a ship as a public vessel of State, the Court should not entertain any evidence put forward to rebut that claim.

NOTICE OF MOTION.

The facts, as set forth in the judgment of the Master of the Rolls, were as follows:—

On or about the 15th or 16th June, 1917, the captain and crew of the S.S. "Mona Leen," while cruising off the south-west coast of Ireland, sighted a vessel which they found to be drifting, having been abandoned by her crew. They took her in tow, and brought her to Queenstown harbour. She was found to be an Italian vessel called the "Eolo," with a valuable cargo of iron ore on board. The owner and master of the "Mona Leen" thereupon issued a writ of summons out of the King's Bench Division (Admiralty) against the owners of the "Eolo," claiming remuneration for salvage of the ship, but no relief was claimed against the cargo. Concurrently with the issue of the writ, the plaintiffs caused a warrant of arrest to be issued, and under that warrant

the vessel was arrested by the Marshal of the Court. The warrant of arrest covered both ship and cargo, while the writ only covered the ship. Before being discovered by the "Mona Leen," the "Eolo" had been steaming for Glasgow, and, while off the south-west coast of Ireland, encountered a hostile submarine, which fired upon them twice. The "Eolo," which was armed with a 6-inch gun, returned the submarine's fire, but without effect. The submarine having approached close to the "Eolo," the crew of the latter, believing their ship was doomed, took to the boats, and cowed away. The "Eolo," however, remained unharmed, and was subsequently found drifting, as already stated. The crew of the "Eolo" were subsequently picked up by a British steamer, and taken to Barrow-in-Furness, whence, with the assistance of the Italian consul, they made their way to Queenstown, to find their vessel safe, but under arrest.

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In these circumstances a notice of motion was issued by the Italian Government for an order that the writ and all subsequent proceedings should be set aside, or, in the alternative, that all further proceedings should be stayed for so long as the vessel remained in the service of the Italian Government, and that the "Eolo" should be forthwith discharged from arrest, on the ground that at the time of the salvage she had been, and still was, requisitioned for service by the Italian Government.

Count Lorenzo Salazar, Italian Consul-General for Ireland, made an affidavit, in which he deposed that on the 15th June, 1917, he received in his official capacity information from the Italian Consular agent in Queenstown that on that morning, about 1 o'clock, the Italian steamship "Eolo," 1020 tons net register, of Genoa, while on a voyage from Melilla to Glasgow with a cargo of iron ore for munition work in Glasgow, was attacked by a German submarine; that the captain and crew of twenty-five men, fearing she would be sunk, abandoned her and took to the boats; that she was subsequently taken in charge by a prize crew, and brought into Queenstown, where she had since been detained at the suit of the salvors; that he was informed by the Italian Ministry of Marine, and by the Italian High Commissioner in London, that the "Eolo" had been requisitioned by the Italian Government, and was, therefore, not liable to arrest; and

K. B. Div. that it was essential for the Allied cause that she should be
(Admiralty.) allowed to proceed to Glasgow immediately.

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The master of the "Eolo," Gio Batta Martini, made an affidavit, in which he swore that on the 22nd of May, 1917, he was ordered by the Ministry of Marine in Rome to proceed to Melilla, and there take on board a cargo of iron ore, to be taken to Glasgow, and delivered to the consignees in the bill of lading mentioned for the purpose (as he was informed by the director of the Society Melilla, under whose orders the cargo was shipped) of being made into munitions of war; that the "Eolo" had been since 29th March, 1917, and still was under requisition by the Italian Government, who were paying her owners about £40 per day for her use; that she was armed with a six-inch gun in charge of gunners of the Italian navy; that he left Melilla on 3rd June, and on 15th June was attacked near Kinsale Head by a submarine, which fired on the "Eolo" twice, whereupon, having (apparently ineffectually) returned her fire, the crew took to the boats; that he did not see the "Eolo" again till the 19th, when, having been picked up by a British ship and taken to Barrow-in-Furness, he eventually reached Queenstown. In a supplemental affidavit he swore that, previous to sailing from Leghorn to Melilla, he received written orders from the harbour-master of Leghorn, on behalf of the Ministry of Marine in Rome (which was a department of the navy of the Italian Government), making requisition of the "Eolo," and ordering him to proceed to Melilla, as stated in his former affidavit; that the said order was not forthcoming, being (as deponent believed) among the documents which he threw overboard when abandoning the vessel; and that between 29th March, when the "Eolo" was first requisitioned, and 22nd May, 1917, he was engaged in carrying coal from Spezzia to Genoa and other ports for the purposes of the Italian Government.

Powell K.C. (with him *Pigot K.C.* and *Andrews*), for the Italian Government:—

The ship of a foreign Government engaged on public duty is free from arrest. *The Broadmayne* (1) was the case of a British

ship requisitioned by the Crown. A ship requisitioned by an allied country has the same privilege as one requisitioned by the British Crown: *The Messicano* (1). That brings the present case within the authority of *The Broadmayne* (2). In *The Parlement Belge* (3), Brett L.J. states the principles on which the law on this point is based:—"That as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every State to respect the independence of every other sovereign State, each and everyone declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." *The Constitution* (4) is also an authority in our favour. The master swears that he got his orders from the Ministry of Marine in Rome—a department analogous to our Admiralty. Is it to be said that, when he has pledged his oath that the vessel was requisitioned, we must produce a member of the Italian Government to corroborate him?

[O'CONNOR M.R.:—In *The Parlement Belge* (5) Brett L.J. says:—"The ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the State. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that, if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into." In view of that statement, am I entitled to go into this question at all, once the Italian Government has claimed the ship?]

(1) 32 T. L. R. 519.

(2) [1916] P. 64; 13 Asp. Mar. Law Cases, 356.

(3) 5 P. D. 197, at p. 217;

4 Asp. Mar. Law Cases, 234, at p. 245.

(4) 4 P. D. 39; 4 Asp. Mar. Law Cases, 79.

(5) 5 P. D., at p. 219.

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K. B. Div. (Admiralty). 1917. *THE "Eolo."* [The King's Advocate-General (Littledale K.C.):—His Majesty's Government recognizes that the "Eolo" is a public ship, owned by an allied Government, and as such free from arrest. The Crown has not yet had time to enter a protest, but will do so during the hearing.]

Serjeant Sullivan K.C. and Conner K.C. (with them Hungerford),
for the owner and master of the "Mona Leen":—

Salvage is a matter of public policy. Is this ship to be allowed to go away with a cargo, which is private property consigned to an unnamed owner in Glasgow? We contend that she was not employed on public purposes. The bill of lading has not been produced. It depends on the terms of the requisition in each case whether the ship concerned was in fact Government property for the time being. The "Eolo" was a privately owned ship, commanded by a private employee, carrying a privately owned cargo. Furthermore she was absolutely derelict and abandoned, and reported sunk. When a ship is abandoned without hope of return, the possession passes to the salvors even against the owners: Kennedy on Civil Salvage (2nd ed.), p. 9: *Cossman v. West* (1). If a ship is not derelict, the master and crew can resume possession; if she is, the salvors have true legal possession even against the former owners.

[O'CONNOR M.R.:—That only refers to ships of exclusively private ownership.]

We submit that the authority of the Italian Government was gone when the "Eolo" was abandoned.

[O'CONNOR M.R.:—Suppose the crew had fought, and all had been killed. Would that have made the "Eolo" a derelict? She was abandoned, not voluntarily, but under overwhelming stress of circumstances.]

No honest sailor leaves his ship save under stress of circumstances. There is no distinction between danger from a submarine and danger from a storm.

[O'CONNOR M.R.:—Then your proposition goes this far, that if a destroyer were abandoned, she would become the property of the salvors?]

It might be so; but it is not necessary to go so far. Whether this was a public ship depends on the terms of the "requisition"—*K. B. Div. (Admiralty.)*
 per se an ambiguous word—and we have no means of knowing what they are. When abandoned the "Eolo" was exclusively employed for the benefit of the Glasgow firm. The "Broadmayne," on the other hand, was admittedly a ship under Government control, carrying oil-fuel for the Government. [He referred to *The Sarpen* (1).]

[O'CONNOR M.R.:—There the only question was whether a particular ship was a king's ship within sect. 557 of the Merchant Shipping Act, 1894. It is not necessary here to show that the ownership of the "Eolo" was in the King of Italy.]

The test is, does the ship become the sovereign's ship for the time being?

[O'CONNOR M.R.:—What is the definition of a "requisitioned ship" within the authorities? Is it not a ship under the orders of a sovereign State and devoted temporarily to public purposes?]

It must, we submit, be doing Government work, not private work. Both the "Messicano" and the "Broadmayne" were engaged in carrying public property on the public service. There is a distinction between a ship used for public purposes, and one used for private purposes though under Government control. Is the ship an ex-territorial ship, part of a foreign country, or not?

[O'CONNOR M.R.:—What sort of evidence is an applicant bound to give? Is it not enough for a foreign government to come in and make a claim to the ship?]

The point has never been expressly decided. The words "usual means" used in *The Parlement Belge* (2) would be fulfilled by, e.g., a letter from a foreign ambassador, as in *The Constitution* (3).

[O'CONNOR M.R.:—The Italian Consul-General says he has his information from the Ministry of Marine.]

Acts of State are proved by the certificate of the competent officer. An affidavit by a consul is not the way in which a

(1) [1916] P. 306.

(2) 5 P. D., at p. 219.

(3) 4 P. D. 39; 4 Asp. Mar. Law Cases, 79.

K. B. Div. communication is passed between one State and another. Count
(Admiralty.) Salazar's affidavit is not conclusive; there is no evidence that the
1917. cargo is the property of the Italian Government.

THE
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The King's Advocate-General (Littledale K.C.) (with him,
Devitt), for the Crown:—

There is here sufficient evidence for the Court to find the purpose for which the "Eolo" was employed under requisition by the Italian Government. In *The Constitution* (1) the Court acted on an unverified letter directing a firm of solicitors to instruct Counsel to make certain statements in Court on behalf of the United States. As King's Advocate-General, I respectfully protest against these proceedings:—

[He put in a protest in the following form:—

"PROTEST ON BEHALF OF THE CROWN.

"The King's Advocate-General on behalf of H. M. The King protests against any proceedings in rem or in personam or otherwise, by way of writ, arrest, detention, or otherwise, being taken or being allowed to remain in open operation against the S.S. "Eolo," upon the ground that she was and is a public vessel under requisition, and in the service of a foreign sovereign state, and submits that all further proceedings in this action be stayed for so long as the said steamship shall remain under requisition in the service of the Italian government, and that the said steamship be ordered to be forthwith freed from arrest and discharged from detention.

"Dated 4th day of July, 1917,

"RICHARD W. W. LITTEDALE.

"K. Adv.

"To

"The Admiralty Marshal,

"Four Courts, Dublin."]

Pigot K.C., for the Italian Government, in reply:—

The principle underlying the decisions in cases of this kind is based on the immunities recognized by all States according to the comity of nations. The cases are divided into two classes: first, those in which the ship is recognized as the property of a sovereign, and secondly, those in which requisitioned vessels are placed on the same footing as ships of war. The gap between these two

(1) 4 P. D. 39; 4 Asp. Mar. Law Cases, '79.

classes is bridged by *The Messicano* (1). Was the "Eolo" requisitioned or not? It is the fact, not the form, which is important. Serjeant Sullivan relied on cases depending on the attitude of the Government, e.g., *The Constitution* (2). That element is out of the present case, in view of the attitude taken up by the King's Advocate-General and the protest put in. The Crown fully recognizes the claim of the Italian Government. The merits of the salvors are also beside the question. The propriety of the arrest of a ship under the control of a foreign Government is the sole point in issue. Was the "Eolo" so requisitioned as to be put on the footing of a ship of war? When the chief representative in Ireland of the Italian Government has made a statement on oath, it is submitted that nothing further is required. But if the Court is of opinion that it must look at the evidence, what is the evidence? What better evidence could be given than the master's affidavit? The "Eolo" was no more engaged on a private enterprise than was the "Parlement Belge." The theory of extra-territoriality is exploded. The immunity of an admitted ship of war depends on the respect shown by one Government to the dignity and authority of the head of another sovereign State. The same principles would dictate the attitude of our Courts on kindred subjects. Hence it would be almost a judicial insult if Count Salazar's statement were not accepted: *The Prins Frederick* (3). It is suggested that seizure by salvors of a derelict sets up a right of ownership. Not so; but there is a stronger right of possession in the case of a derelict than if the crew were still on board.— Absurd consequences would flow from the theory of ownership in the case of a derelict warship. The authorities cited on this point by the other side only apply as between subject and subject, not where the comity of nations and the dignity of Courts are concerned. But this is not the case of a derelict in the ordinary sense of the word. Abandonment by a crew in circumstances of great alarm caused by an enemy is different from abandonment in other cases, e.g., in case of fire. In *The Pickwick* (4) Dr. Lushington says (at p. 670):—"The leaving this vessel on the

K. B. Div.
(Admiralty.)
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(1) 32 T. L. R. 519.

(2) 4 P. D. 39; 4 Asp. Mar.

Law Cases, 79.

(3) 2 Dod. 451.

(4) 16 Jur. 669.

K. B. Div. (Admiralty.) present occasion arose entirely from a collision, and the alarm resulting from it. The master and crew, with the exception of three men, abandoned the vessel, and they left her at a subsequent period. It has never been held that an abandonment at the instant of collision constitutes 'derelict'; but I can entertain no doubt that, in the legal sense of the word, this vessel was a 'derelict' to all intents and purposes, because three days had elapsed from the time of the collision." *The Sarpen* (1) only decided whether for the purpose of a particular section a ship was a king's ship. The cargo of the "Eolo" was for all intents and purposes munitions of war. She cannot be put back into her former position unless she is released, cargo and all. We respectfully accept the Court's definition of a requisitioned ship: one which is under the authority or orders of a sovereign State, devoted to the public purposes of that State. The facts in this case amply satisfy this condition.

O'CONNOR M.R. :—

[His Lordship, having stated the facts, proceeded as follows :—]

The important facts to be noticed are: 1, that the vessel is in private ownership; 2, that she sailed under the order of the Italian Ministry of Marine; 3, that she was carrying materials for making munitions of war; 4, that she was in the pay of the Italian Government; and, 5, that she was in charge of gunners of the Italian Royal Navy. From these facts, as well as from other facts not deposed to, but of which I am bound to take judicial cognizance, viz., that this country is in a state of war with Germany, and that Italy is one of our allies, I have no difficulty in coming to the conclusion that the vessel, when salved, was in the service of the Italian Government for State purposes. This is disputed by the plaintiffs. They have filed no affidavit in answer, but this is because there was no time to do so. I regret this exceedingly, and, in any other circumstances, I would adjourn the hearing of the motion to give the plaintiffs an opportunity of filing any affidavits they should be advised.

But this is a matter that does not brook delay. The cargo of the vessel is intended for munitions of war, and may be urgently required by the British or the Italian Government. Private interests must yield to the supreme necessity of the State. I am, however, of opinion that no injustice whatever will be done. There is nothing to suggest that the facts are not such as have been deposed to. What, then, is the law governing cases of this kind? It is admitted that ships of war, whether belonging to the British Government or to a foreign Power, are not subject to arrest. This immunity from arrest is not confined to ships of war, but extends to all ships the property of the State, whether home or foreign, and employed for State purposes. *The Parlement Belge* (1), as has been said, is one of the cases. "The exemption of a public ship of war of a foreign government from the jurisdiction of courts depends rather upon its public than upon its military character: *The Thomas a Scott* (2). But the immunity does not stop at ships belonging to a State. It has been settled by recent authorities that the privilege applies to ships under requisition by our own Government, as in the case of *The Broadmayne* (3), and to ships requisitioned by an allied State, as in the case of *The Messicano* (4). These authorities cannot be disputed in this Court, and indeed they are not disputed. The learned counsel for the plaintiffs rather argued that the "Eolo" is not a requisitioned ship in the sense of that description as used in the cases cited, and that the evidence does not prove that it is. It was said that "requisitioned" is a word of very indefinite meaning, and may embrace any form of engagement down to a voluntary private contract which would not bring a vessel into the service of the State. That may be so, and it is necessary therefore to define with some accuracy the meaning of "requisitioned ship," so as to bring a case within the authorities of *The Broadmayne* (3) and *The Messicano* (4). As I understand these authorities they govern the case of a ship sailing under the order of a sovereign State for State purposes, and for a limited time. This leaves the property in the ship in the owners, as it was in the two cases just mentioned,

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(1) 5 P. D. 197.

(2) 10 L. T. N. S. 726.

(3) [1916] P. 64; 13 Asp. Mar. Law
Cases, 356.

(4) 32 T. L. R. 519.

K. B. Div. but this does not make a ship the less a requisitioned ship.
(Admiralty.) The very point was taken in *The Broadmayne* (1), and this is
 1917. the observation upon it of Swinfen Eady L.J. at p. 70 :—"It was
 THE urged by counsel for the plaintiffs that the effect of requisitioning a ship is not to change the ownership, and the ship
 "KOLO." requisitioned remains the property of the owners notwithstanding the requisitioning, and that when the use of the ship by the Crown ceases the ship is restored to her owners. That is so, but it does not prevent a ship, so long as she remains under requisition, being in the service of the Crown, and as such exempt from process of arrest."

O'Connor
 M. R.

It seems to me that the essential for giving immunity from arrest is that the ship is under the orders of a sovereign State for the service of the State. Once that characteristic is found, the privilege must be conceded on the principle which is at the root of the law upon the subject. That principle is that every sovereign is exempt from the jurisdiction of every court. In the language of Lord Esher in *The Parlement Belge* (2)—"The exercise of such jurisdiction would be incompatible with his regal dignity, that is to say, with his absolute independence of every superior authority."

The evidence here is that the ship was sailing under the order of the Italian Government. Does not then the arrest clash with the order of a sovereign State which is not subject to British territorial jurisdiction? This consideration seems to me to establish the case which has been made for the discharge of the ship.

The application of the Italian Government is supported by the protest of the Attorney-General, represented in Court by the King's Advocate, Mr. Littledale.

[His Lordship read the protest.]

In my opinion the protest of the King's Advocate-General is amply warranted by the evidence in the case.

With reference to the contention of the plaintiffs that the evidence offered by the Italian Government is insufficient it is at least doubtful whether, when a claim is made by a foreign Power to a ship as a public vessel of State, that claim in itself is not

(1) [1916] P. 64; 13 Asp. Mar.
 Law Cases, 356.

(2) 5 P. D. 197, at p. 207.

enough to oust the jurisdiction of the Court. In *The Parlement Belge* (1) it was contended that the immunity from arrest which was claimed by the King of the Belgians was lost by reason of the ship having been used for trading purposes. As to this Lord Esher said (at p. 219):—"The ship has been by the Sovereign of Belgium, by the usual means, declared to be in his possession as Sovereign, and to be a public vessel of State. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that, if the ship be declared by the Sovereign authority, by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of the *Exchange* (2). Whether the ship is a public ship, used for national purposes, seems to come within the same rule."

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(Admiralty.)
 1917.
 "Ex 10."
 O'Connor
 M.R.

It seems from this that Lord Esher was of opinion that once a claim is made by a foreign Power the jurisdiction of the Court is ousted. It is not necessary for the purpose of the present case to investigate this question, and possibly the proposition is subject to some limitation. It may be that at least there must be *prima facie* evidence of the public character of the vessel; but, be that as it may, I am of opinion that there is ample evidence in this case to support the claim to immunity.

Solicitor for the Italian Government: *H. D. Vaughan.*

Solicitors for the owner and master of the "Mona Leen":

J. & J. Bennett.

Solicitor for the Crown: *The King's Proctor (W. S. Hayes).*

T. C. T.

(1) 5 P. D. 197.

(2) 7 Cranch, 116.

K. B. Div.

1917.

June 28.

IN THE GOODS OF PATTISON.
HENDERSON v. PRIESTMAN (1).

Probate—Will—Unattested Signature—Subsequent Acknowledgment.

A testatrix signed her will, but her signature was not then attested. Subsequently she signed it again in the presence of two witnesses, who signed above her later signature, but before she had written it. The words "signed again in the presence of", etc., appeared above the witnesses' signatures.

Held a good acknowledgment of the earlier signature, and that the will should be admitted to probate.

TRIAL OF ACTION.

The plaintiff, Kate Robinson Henderson, a niece and one of the next-of-kin of Mary Ann Pattison, of 77 Talbot Street, Dublin, who died on December 24th, 1916, claimed that a certain paper writing purporting to be the last will of the deceased, bearing date May 1st, 1903, but re-signed on November 27th, 1905, in the circumstances hereinafter mentioned, should be condemned, and a grant of administration issued to her. The defendants were Mary Ann Priestman, who was sued as executrix according to the tenor, and the Leper Mission Trust Association, who were the residuary legatees under the alleged will. The statement of claim contained the three usual pleas, but the only material issue was want of due execution. The alleged will ran as follows :—

" May 1st, 1903.

77 Talbot Street,
Dublin.

"For a long time it has been on my mind to leave money at my death to the Leper Missions in India and China. I have 22 A. shares in the Dundalk Gas Co. and 5 B. shares, and in the National Bank, 7 shares. To my niece, Emma Robinson, of Portland, Oregon, U. S., I leave one hundred pounds; to Mrs. Priestman, Miss Fitzgerald, and Miss Casey—in shop—five pounds each. Miss Fitzgerald was in Mrs. Magee's, Talbot Street. After that, and all expenses that may attend illness and being laid to rest respectably and in best oak, goes to Leper Missions as above.

"MARY ANN PATTISON."

(1) Before DODD J., sitting at Nisi Prius without a jury.

[On the other side of the same sheet testator continued as *K. B. Div.*
follows :—]

" P. S.

1917.
HENDERSON
".
PRIESTMAN.

" Up to this date, May 1st, 1903, I have never made a will. None of my Brother-in-law's descendants are to get anything. His name was Edward Longfield Lloyd of Dundalk. My sister, Mrs. Giffney, has no children living, so none of her descendants are to derive anything from the will.

" MARY ANNE PATTISON.

" Nov. 27th, 1905.

Signed again in presence of

Mary McDowell

Mary Ann Priestman.

M. A. Pattison."

Across the top left-hand corner of the first page were written the words—

" And Mrs. Priestman will see my wishes carried out."

Mary Ann Priestman examined, swore as follows :—I knew the deceased for twenty years; intimately for eighteen. I used to go to see her once a week, and am familiar with her handwriting. This document dated 1st of May, 1903, and headed 77 Talbot Street, is all in her handwriting, with the exception of the names of myself and Mrs. McDowell, written on second page as witnesses. [Counsel reads the document which is propounded as a will.] The deceased signed it in my presence. When I signed it there was the signature " Mary Ann Pattison " on the first page. Miss Pattison acknowledged that as her signature. After we had both signed on the second page Miss Pattison again signed it " Mary Ann Pattison." I received a letter on 3rd May, 1903 [identifies letter], from Miss Pattison. It is all in her own handwriting. I also received a sealed envelope from Miss Pattison. I kept it for two years, until she asked me to bring it to her at ten o'clock in the morning to sign it, as it was not signed, and she wished to sign it in my presence. The date on which she asked me to bring back the sealed envelope was 27th November, 1905. It was in conversation she asked me to do so. She said she wished to sign it in the presence of myself and Mrs. McDowell, and to be at the shop at ten o'clock in the morning. I brought it as requested. She broke the seal, took out a document, and Mrs. McDowell and I signed it in her presence. The

K. B. Div. words on the document, "signed again in the presence of", were
 1917. written on it before we signed it. Mrs. McDowell signed first, I
 HENDERSON signed next, and then Miss Pattison signed. We were all present
 v. at the same time. Miss Pattison then put the document into a
 PRIESTMAN. fresh envelope, and with it the envelope which had been sealed
 and a few pieces of printed paper, sealed it up, and handed it to me.
 I retained it until after her death, and then brought it to
 Mr. Seville, justice of the peace, Talbot Street, as I did not know
 what to do. He called in Mr. Thompson, and it was opened on
 Christmas Day, 1916. The document now before me is as I saw
 it when it was signed. Miss Pattison was an intelligent, clear-
 headed woman. She had no near relatives in this country. I
 heard of only one relative, a niece, in Portland, Oregon, to whom
 £100 is left.

Cross-examined by *Wilson K.C.*—I told her many times that
 her will should be signed. She said, "I think I will take
 your advice. Bring it in to me at ten o'clock to-morrow morning,
 and Mrs. McDowell will sign it in your presence." I did so. She
 said next morning in our presence, "I want to sign my will again
 in your presence." We all three then signed the document.

His Lordship—When she said she wanted to sign again was it
 with reference to the signature immediately above it? Yes.

Mrs. Mary McDowell examined by *Blood K.C.*—I was
 formerly Miss Casey, and was an assistant at 77 Talbot Street. I
 knew the deceased for ten years. I knew her handwriting and
 signature. On this occasion she told me this was her will, and
 asked me would I witness it. I said I would. I saw her writing
 "signed again in presence of". I cannot be sure if her name was
 above that. I did not notice it. I signed, Miss Priestman signed,
 and then the deceased signed. We were all three present at the
 same time.

Herbert Wilson K.C. (with him, *J. M. Whitaker*), for the
 plaintiff:—

This is not a good acknowledgment of the deceased's signature.
 For the requisites of a valid acknowledgment, see Jarman on
 Wills (6th ed.), vol. i, p. 113. It is to be noted that the postscript
 begins by saying that the deceased "never made a will."

Blood K.C. (with him, *Leet*), for the residuary legatees :—

K. B. Div.

The second signature is a virtual acknowledgment of the first.

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[He referred to sect. 9 of the Wills Act, 1837, 1 Vict. c. 26, and cited *Burke v. Moore* (1).]

THE PERSON

PRIESTMAN.

J. C. Davison, for the executrix according to the tenor.

Dodd J. :—

June 28.

What I have to decide here is whether there was a sufficient acknowledgment of the testatrix' signature within the provisions of the Wills Act. The meaning and effect of the testimony is for the Court. Mrs. Priestman said that on November 27th, 1905, she got a verbal message from Miss Pattison, asking her to come and witness her signature to her will. Mrs. McDowell's evidence of what took place on that day is clear and uncontradicted. She said the deceased told her the document was her will, and asked her if she would witness it. She saw the deceased write the words, "Signed again in presence of"; but she could not swear whether testator's name was written above those words or not. She said she signed, Mrs. Priestman signed, and the deceased then signed. I think the words "signed again", &c., are evidence of an intention to acknowledge the previous signature. I accordingly give judgment for the plaintiff, but all parties will get their costs.

Solicitor for the plaintiff: *H. Thompson.*

Solicitors for the residuary legatee: *A. & L. Goodbody.*

Solicitor for the executrix: *H. Thompson.*

T. C. T.

(1) I. R. 9 Eq. 609.

K. B. Div. THE KING (AT THE PROSECUTION OF JOHN GARVEY) v.
 1917. THE JUSTICES OF THE PEACE FOR THE COUNTY
 Oct. 26. OF ARMAGH (1).

Justices—Sureties for peace and good behaviour—Inherent Jurisdiction—Right of person showing cause to call evidence—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58).

The provisions of sect. 43, sub-s. 13, of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 54), do not apply where justices, by virtue of the jurisdiction inherent in them under their commissions, bind an individual with sureties to keep the peace and to be of good behaviour. The Act and section only apply to courts of summary jurisdiction, and in every case it is a question of fact whether justices so binding acted as such court or under their commissions. Only when acting as such court are they bound to allow the person brought before them to call evidence, and to admit that person to bail, and send forward the complaint for trial at the next Petty Sessions.

CERTIORARI.

Motion to make absolute a conditional order for a writ of certiorari, directed to the justices of the peace for the county of Armagh, for the purpose of bringing up to be quashed an adjudication of those justices, made at Crossmaglen on the 28th April, 1917, on a complaint by one Henry Garragher against the prosecutor, John Garvey. The facts in the case were nearly all in controversy on the affidavits filed to ground the application and to show cause. The material facts are as follows:—

The complaint made against the prosecutor by Garragher was that the prosecutor had used threatening language towards the complainant, whereby the latter had just cause to fear injury. The incident in connexion with which the complaint was made was alleged to have taken place on the 28th April, 1917. The information was sworn by Garragher the same day, and a warrant was issued on which that same evening the prosecutor was arrested, and brought a distance of five miles to Crossmaglen. At Crossmaglen the courthouse was opened by the clerk of petty sessions, and the attendance of two justices secured to hear the complaint. The arrest was made about 9 p.m., and the hearing took place at

(1) Before SIR JAMES CAMPBELL C.J., and DODD J.

about 10 p.m. Witnesses were examined for the complainant, but no evidence was called for the prosecutor. He alleged that he had applied for permission to call evidence, and also for an adjournment of the case to the next Petty Sessions. This was categorically denied in the affidavits filed to show cause. Having heard the complaint the justices made the following order:—

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R.
(*GARVEY*)
v.
JUSTICES OF
CO. ARMAGH.

It is ordered that the defendant do forthwith enter into a recognizance in the sum of £20, with two sureties in the sum of £10 each, to keep the peace and be of good behaviour towards all His Majesty's subjects, and especially towards the complainant, for the term of twelve months next ensuing; and it is adjudged that if the defendant fail to comply with this order he be imprisoned in Armagh gaol for the space of two months, unless the said recognizance be sooner entered into.

The prosecutor gave the required recognizance, with two sureties.

The order was entered in the Petty Sessions Order-Book, the entry in column 8 ("Act under which order made") being 34 Edw. 3, c. 1; and the certificate of the order was entitled, "34 Edw. 3, c. 1, and Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93). Form 1A, Certificate of Order."

The conditional order was obtained on the 31st May, 1917, on the following grounds:—"The justices made the said order without jurisdiction, and in excess of jurisdiction, inasmuch as it was made—1, without giving the accused an opportunity of calling witnesses for the defence, and thereby denying him justice; 2, the accused was not unable to give bail for his appearance at the ordinary Petty Session; 3, that the said order was made by justices out of Petty Sessions; and on the ground that the order is bad on its face, as it does not contain a finding of fact necessary to give the justices jurisdiction to bind the prosecutor to keep the peace."

On the 18th June, 1917, the time for showing cause was by order of the Court extended to the 21st June, 1917.

Williamson K.C. (with him *Megaw*), for the prosecutor:—

If the justices sat out of Petty Sessions, their order is bad in form. It should have stated the facts on which they found (judgment of *Gibson J.* in *R. (Boylan) v. Derry JJ.* (1)).

(1) [1912] 2 I. R. 374, at p. 385.

K. B. Div. If the justices sat as a court of summary jurisdiction, they
 1917. should have (a) admitted the prosecutor to bail (Summary
R. Jurisdiction (Ireland) Act, 1862 (25 & 26 Vict. c. 50, s. 2)); and
 (GARVEY) (b) allowed the prosecutor to call witnesses (Criminal Justice Ad-
v. ministration Act, 1914 (4 & 5 Geo. 5, c. 48, s. 43, sub-s. 13)). The
 JUSTICES OF latter statute, it is submitted, applies even if the justices did not
 CO. ARMAGH. sit as a court of summary jurisdiction.

The order purports to have been made under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93).

D. M. Wilson K.C. and *Cusack*, for the justices :—

The certificate of the order is only in the form required by the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 21, sub-s. 2. The justices clearly acted by virtue of their commissions under 34 Edw. 3, as appears from the entry in column 8 of the Petty Sessions Order Book.

The order is good on the face; it recites the complaint, and that is sufficient: *R. (Mulholland) v. Monaghan JJ.* (1), in which *R. (Boylan) v. Derry JJ.* (2) was considered and explained.

Megaw, in reply.

CAMPBELL L.C.J. :—

We do not think it necessary to reserve our judgment for consideration, as the case has been very fully argued.

The case was and had to be argued apart from the affidavits, and on a question of law and admitted fact, because the merits of the case and what occurred at the investigation are in controversy, and there is no common ground as to these matters.

The question of law argued was that the proceedings in the case were proceedings before a court of summary jurisdiction, and that, therefore, the justices were bound, by the jurisdiction conferred upon them, to admit the prosecutor to bail, and send on the case for trial at the next Petty Sessions, and were also bound to allow the prosecutor to examine witnesses before them. As part of that contention, reliance was placed on sect. 43, sub-s. 13, of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58). That was relied

(1) [1914] 2 I. R. 156.

(2) [1912] 2 I. R. 374.

on for two purposes--first, as bearing on the contention that, assuming that the justices were a court of summary jurisdiction, they had no power to refuse to allow witnesses to be examined or any jurisdiction other than to admit the prosecutor to bail, and send on the case for trial; and, secondly, a wider and more far-reaching effect, namely, the abolition of the inherent jurisdiction to bind over to keep the peace which was vested in the justices under their commission.

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1917.
R.
(L. v. R.)
J.
JUSTICES OF
CO. ARMAGH.
Sir James
Campbell C.J.

I think this latter proposition is without foundation. All that the section expressly provides is that where a person is brought before a court of summary jurisdiction to show cause why he should not be bound over to keep the peace and be of good behaviour, such person is entitled to call evidence. That is provided, but that and nothing more; and that provision was enacted to get rid of previous decisions in so far as they laid down that in such cases a person so brought before the court could not call witnesses. That Act and section leave untouched the question for our decision, namely, whether we are coerced upon the facts to the conclusion that the two justices here sat and acted as a court of summary jurisdiction. If I were satisfied upon the facts, and coerced by them to find that these justices so acted, I think there would be a great deal to be said for the other points argued in support of the application; but I am not so satisfied, and being bound, as this court always is, to assume in favour of the regularity and legality of proceedings, and having regard to the contents of the only verified documents before the court, I am of opinion that these two gentlemen did not sit and act as a court of summary jurisdiction. I am led to that conclusion mainly by the nature and contents of the verified official documents, and the nature of the investigation, held as it was at 10 o'clock at night and shortly after the prosecutor's arrest.

I hold, therefore, that the justices acted under the jurisdiction inherent in them by virtue of their commission, and that the conditional order must be discharged with costs.

Dodd J. concurred.

Solicitors for the prosecutor : *Messrs. Fisher & Fisher.*

Solicitor for the justices : *Messrs Corr & O'Connor.*

K. B. Div.

1917.

Nov. 6.

IN RE DONALD BOYD, AN INFANT (1).

Infant Custody—Right of mother—Abandonment—Habeas Corpus—Custody of Children Act, 1891 (54 Vict. c. 3).

A mother, by profession a hospital nurse, who had no permanent home (the residence of the father being unknown), claimed the custody of her son aged thirteen years, who with her consent had long resided with her sister. She intended to take her son to reside with her in a foreign country.

The Court examined the boy in chamber, and, being of opinion that it was for his benefit to leave him in his present custody, refused the mother's application for a writ of habeas corpus.

In re O'Hara, [1900] 2 I. R. 232, distinguished.

HABEAS CORPUS by the mother of the infant to recover custody of the infant, Donald Boyd. The infant was the son of a Presbyterian minister, who no longer held a charge, and whose whereabouts were stated by the applicant, his wife, to be unknown. The applicant had come from the United States of America to Ireland in the year 1908 with her son, the infant Donald Boyd; and on returning to the United States in 1911, had placed the infant in the custody of a married sister of hers, Mrs. Boyers, who carried on the business of a newsagent, and whose husband was an assistant in a large Dublin boot shop. Mrs. Boyers had brought up the infant with her own son, his cousin, and provided a happy and comfortable home for him, first, at Drogheda, where she then lived, and afterwards at Dublin. The infant, who was now over thirteen years of age, was attending Wesley College, Dublin, with his cousin, and on being personally examined by the Court in chamber expressed great unwillingness to be changed from his present custody. Mrs. Boyers undertook to continue his support and education until such education was reasonably completed. The applicant, his mother, was now earning her living as a hospital nurse in the United States, earning 30 dollars a week. As her profession necessitated her constantly changing her residence, she had no house, but kept a single apartment. She

(1) Before SIR JAMES CAMPBELL C.J., and MADDEN and DODD JJ.

proposed to put the infant to lodge with friends in the United States, where she could have access to him, and to provide for his maintenance and education. K. B. Div.
1917.
In re BORD.

The application had in the first instance been made in a different form to transfer the infant to the custody of other relatives in Ireland. All the parties belonged to the Presbyterian Church.

A. H. Webb, for the applicant:—

The mother has not deserted or abandoned the child. There is nothing against her character. She is, therefore, entitled to his custody: *In re O'Hara* (1).

[CAMPBELL C.J.—In that case the applicant had a house, and did not propose to take the child out of the jurisdiction.]

The mother is entitled to the custody of the child. The mother undertakes to support the boy and keep him at school, and to look after him as well as possible.

Tobias, for the respondent:—

In the case of a boy above the age of fourteen, and in the case of a girl above the age of sixteen, the Court will inquire whether the child consents to be where he is: per Lord Esher (then Brett M.R.), *Re Agar Ellis, Agar Ellis v. Lascelles* (2).

The need of a mother's care in the case of a little girl is utterly different from that in the case of a school-boy. This is not a bona fide application. The mother has changed her mind, and she now purposes to take the child out of the jurisdiction. Wesley College, Dublin, is not confined to students of any one denomination.

The judgment of the Court was delivered by Sir JAMES CAMPBELL C.J.:—

This is one of those applications in which the Court has always to discharge an unpleasant task. But on the present occasion fortunately no question of religion is involved, as there is no controversy as to the boy's religious training. It appears that the boy's mother has been living apart from her husband. We know

(1) [1900] 2 I. R. 232.

(2) 24 Ch. D. 317, at p. 326.

K. B. Div: nothing as to the circumstances, and do not assume that it was
1917.
In re BOYD. not been influenced by any such consideration. The present
Sir James application was in the first instance based on affidavits that
Campbell C.J. indicated a desire on the part of the mother to transfer her
son not to her own custody, but to the custody of her sister
and brother at Lishenry. The primary application was to
transfer him to the custody of his grandfather, a very old man,
who purported to file an affidavit expressing anxiety to have the
custody in order that the boy might enjoy the comforts of a home
in Lishenry. This was the original frame of the application, and
in support of it the mother stated she was not in a position to help
the boy, and could only contribute slightly to his keep. The
application to hand over the custody to the grandfather, who is
not residing at Lishenry, was supported by representations which
turned out to be inconsistent with the facts. The grandfather has
been living upon licensed premises situated some distance from
Lishenry, having ceased to reside with his son and daughter in
consequence of some domestic friction. The suggestion that we
should hand over the boy to him is therefore out of the question
and was abandoned. The application was then changed into an
application to transfer the custody of the boy to his uncle and
aunt. For the purpose of resisting that application, affidavits
have been filed which would be relevant if the application had
remained in that form, but when it became apparent that in the
absence of any reflection of any kind upon the aunt with whom
he is now residing we could not listen to any application to remove
the boy in the circumstances from his present happy surround-
ings to Lishenry, another change of tactics was made, and the
mother applied to have the boy transferred to herself. In her
affidavit she says she is a fully qualified nurse. It speaks well for
the mother that she has had the energy to take up this profession
and qualify herself in it. She says she makes 30 dollars a week,
and with that sum she can support herself and educate the boy. But
the material consideration is this: what is the boy going to gain by
the transfer? If the mother had satisfied us she was going to
keep, or could afford to keep, a separate house, where the boy could
have her company and care, the matter would be different. But

all she has is a bedroom; so if we acceded to her application we have no guarantee the boy would derive the benefit of a home or of a mother's care. It is proposed to put him out to board with other people, the mother in the course of her duties as a nurse being compelled to go from place to place.

K. B. Div.
1917.
In re Boyd.
S. J. Campbell C.J.

There is the further fact that once this boy is sent to the United States he is out of the jurisdiction of the Court, and if the mother found herself unable to provide for the boy, or to carry out the undertaking, we could not force her to carry it out, or get the boy back. The mother is not a lady of independent means; she is depending on a profession in which physical health is a condition of her employment. Any sickness might leave her financially stranded. Are we bound, in exercising a jurisdiction, in which we must consider the interest of the boy, to listen to the mother's application, and take away the boy from surroundings and associations which he has formed for the past six years—a long period for a young boy—as the result of the mother's own act in placing him there? I should have listened to the application with great care had she based it on Mrs. Boyers being incapable, from physical or other infirmity, to properly attend to the boy, or on any suggestion that the boy had not received good treatment, or that the treatment was likely to be interrupted; but no such suggestion has been made. The only suggestion is that Mrs. Boyers was not very strong in health, and this has not been sustained in any sense or degree that would unfit her for the custody.

In view of the course sometimes adopted in these cases, and of the age of the boy, we have thought it proper to see the boy himself in chamber. We were greatly impressed by the manifest care taken of this boy. He said he was most happy in his surroundings, fond of his school, and of his uncle, aunt, and cousin, and anxious to remain where he was, and expressed, in the most emphatic way, his dislike to the proposal that he should be taken to America. He satisfied us that he is naturally intelligent, and, for a boy of his age, well educated.

Mrs. Boyers has answered a few questions we put to her as to her social position. She favourably impressed the Court as an intelligent lady of education. She and her husband are in a

K. B. Dw. position to carry out the undertaking they have given to continue
1917. to educate the boy till his education is reasonably completed.

In re BOYD.

Sir James
Campbell C.J.

It being our duty in an application of this kind to consider primarily the interests of the boy, it is impossible for us to risk this great adventure of allowing the boy to be taken to the United States, to be left without a fixed home, or even the company of his mother. To venture on that experiment would be most unwise, and we are unable to accede to this application. I have carefully refrained from making any reflection on the applicant; but I must say, on the facts before us, and having regard to the manner in which the application has shifted, we are not satisfied that the form the application has ultimately taken is altogether bona fide. For some unexplained reason, strained relations have arisen between the applicant and her sister. But we cannot allow the boy's interest to be the stake in that contest. Having received the undertaking Mrs. Boyers has given, we shall leave the boy where he is. The mother can renew the application hereafter, if she has good grounds for it. We shall give no costs against her. But if an improper application is made hereafter we shall make the applicant pay the costs of it.

Solicitors for the applicant: *Allen & Halpin.*

Solicitor for the respondents: *J. W. Davis.*

A. E. C.

THE KING (AT THE PROSECUTION OF PATRICK JOHN M'MORROW) *v.* CAPTAIN THOMAS EDWIN FITZPATRICK, R.M., AND OTHERS (1). K. B. Mr.
1917.
Nov. 19, 20.

Petty Sessions Clerk—Petty Sessions Clerk (Ireland) Act, 1858 (21 & 22 Vict. c. 100), sects. 7, 8, 29—Power of the Lord Lieutenant—Limits of age of candidates—Mandamus—Office held at pleasure—Absolute discretion to determine such office.

Section 29 of the Petty Sessions Clerk (Ireland) Act, 1858 (21 & 22 Vict. c. 100), gives the Lord Lieutenant full power to prescribe limits of age for candidates for the post of Petty Sessions clerks.

Where an individual or department, during whose pleasure an office is held, declares the tenure of that office shall cease, no Court has jurisdiction to examine or investigate into the reasons, good or bad, which led to that declaration, once, in fact and without condition, the tenure of the office has been determined. *Brady v. The Queen* (3 N. I. J. R. 279) applied.

The following are the material provisions of the statutes referred to in the argument and judgment:—

Petty Sessions Clerk (Ireland) Act, 1858 (21 & 22 Vict. c. 100):—

Sect. 7.—As often as any vacancy shall arise in the office of Petty Sessions clerk serving one district only, the justices of such Petty Sessions shall nominate and appoint some proper person to fill the said office.

Sect. 8.—Every Petty Sessions clerk shall hold such office during the pleasure of the justices of the district of which he shall be clerk, and of the Lord Lieutenant.

Sect. 10.—It shall be lawful for the Lord Lieutenant to make such allowance as he shall consider fit and reasonable to the clerks of the justices in the borough of Cork and town of Belfast to enable them to provide such competent assistants as the nature and extent of their duties or the exigencies of the case may require.

Sect 29.—It shall be lawful for the Lord Lieutenant to make such general rules as shall seem to him expedient for the purpose of carrying into effect the provisions of this Act, and from time to time to amend and vary such rules as occasion shall require.

(1) Before SIR JAMES CAMPBELL C.J., and MADDEN and DODD JJ.

K. B. Div. Petty Sessions Clerks and Fines (Ireland) Act, 1878 (41 & 42
1917. Vict. c. 69):—

R.
(*M'MORROW*) Sect. 6.—The power of making general rules conferred upon the Lord
v. Lieutenant by the 29th section of the principal Act shall be construed and
FITZPATRICK. extended so as to authorize the making from time to time of regulations
defining the duties of clerks of Petty Sessions, and the mode of performing
the same; and the Lord Lieutenant may, if he shall think fit, provide for the
making of allowances and granting remuneration to Petty Sessions clerks for
any duties imposed on them by any such rules.

Petty Sessions Clerk (Ireland) Amendment Act, 1907 (7 Ed. 7,
c. 22):—

Sect. 1 (1).—All the provisions of sect. 13 of the Petty Sessions Clerk
(Ireland) Act, 1858, and any enactment amending the same with reference to
gratuities or pensions which may be given to Petty Sessions clerks retiring from
office... shall apply to assistants of clerks of Petty Sessions at Cork and
Belfast, or hereafter to be appointed pursuant to the provisions of sect. 10 of
the said Act, and approved of by the Lord Lieutenant.

(2). The power of making rules conferred on the Lord Lieutenant by
sect. 29 of the said Act shall extend to the making of rules respecting the
qualifications, salaries, and mode of appointment of any such assistants here-
after to be appointed, and respecting the remuneration of any such assistants
whether existing or hereafter to be appointed.

MANDAMUS.

Motion to make absolute a conditional order for a writ of
mandamus directed to the justices of the peace for the Petty
Sessions district of Drumkeerin in the county of Leitrim, com-
manding them to elect a clerk of Petty Sessions for that district
in the manner required by law.

On the 29th January, 1917, the following order of the Lord
Lieutenant was issued and published:—

“WIMBORNE.

“By virtue and in pursuance of the powers and authorities vested in Us
by the provisions of the Petty Sessions Clerk (Ireland) Act, 1858, section 29,
We do hereby make the following general rules for carrying into effect the
provisions of the Act:—

“From this date during the continuance of the war, and for six months
after its termination, the rules made by the Lord Lieutenant on the 14th day

of May, 1915, in reference to the age of candidates for the position of Petty Sessions clerk, shall be suspended, and the following rules substituted therefor :—

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"The limits of age of candidates seeking the appointment of Petty Sessions clerk shall be 41 to 50 years of age except—

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"(a) In the case of a candidate who is already a Petty Sessions clerk, the limits of age shall be 41 to 55 years.

"(b) In the case of any person who, at the time of his appointment, is serving in His Majesty's Naval or Military Forces, or who, since the beginning of the war, has been discharged from service in His Majesty's Naval, Military, or Police Forces on account of wounds, injuries, or disease received or contracted in such service, the limits of age shall be 31 to 50 years.

"The rules made on the 6th day of April, 1916, are hereby revoked."

On the 27th July, 1917, at an election held for the vacant post of Petty Sessions clerk of the Petty Sessions district of Drumkeerin, Co. Leitrim, M'Morrow, the prosecutor, who was under the age of forty-one, received the majority of votes of the justices, and was declared appointed. His name was then sent forward to the Lord Lieutenant for approval. On the 14th August, 1917, the Registrar of Petty Sessions Clerks, on the instructions of His Excellency, wrote to the prosecutor as follows:—

"I have to inform you that the Lord Lieutenant has ordered a fresh election to be held for the Petty Sessions clerkship of Drumkeerin, and that you are ineligible, as you are of military age." On the same date the registrar wrote to the justices of the Drumkeerin Petty Sessions district, advising them that the Lord Lieutenant had ordered a new election for the post of Petty Sessions clerk of their district, as Mr. M'Morrow was of military age, and also to the Clerk of the Crown and Peace for the County of Leitrim, directing him to transmit a copy of the notice of the time and place of the new election, with direction that such notice, inter alia, should contain the particulars as to the age limit prescribed by the Order of the 29th January, 1917. On the 15th of August, 1917, the registrar wrote to the prosecutor's solicitor, informing him that His Excellency had directed a new election, as the prosecutor was not eligible. Notices for the holding of the new election on the 31st August, 1917, were duly published, such notices containing the rules as to age limits prescribed by the Order of the 29th January, 1917.

K. B. Div. The prosecutor again went forward as a candidate for election.
 1917. The election was held at Drumkeerin Petty Sessions Courthouse
 R. on the 31st August, 1917. There were seven magistrates, including
 (M'MORROW) Captain Fitzpatrick, R.M., present, and eight candidates, in-
 v. cluding the prosecutor and Lieutenant Fraser. A poll was taken,
 FITZPATRICK. on which six of the magistrates voted. The prosecutor and
 Lieutenant Fraser each secured two votes, and two of the other
 candidates secured one vote each. The resident magistrate did not
 vote. A second vote was then taken between Lieutenant Fraser and
 the prosecutor. The prosecutor secured five and Lieutenant Fraser
 three votes. The resident magistrate then declared Lieutenant
 Fraser elected. There was some controversy as to the grounds
 for this declaration, the affidavits in support of the motion stating
 that the resident magistrate declared Lieutenant Fraser elected on
 the ground that the prosecutor was ineligible, and the resident
 magistrate, in his affidavit showing cause, deposing that his
 reason for the declaration was the ineligibility as voters of three
 of the prosecutor's five supporters. On the argument on the
 application the Court intimated that the first question to be tried
 was as to whether the prosecutor was an eligible candidate; and
 this report is concerned only with the argument and decision in
 law on that point. On the 12th September, 1917, His Excellency
 intimated his approval of the appointment of Lieutenant Fraser,
 and on the 20th September the conditional order was obtained,
 with a direction that it was to be served personally on Captain
 Fitzpatrick and Lieutenant Fraser.

Carrigan K.C. (with him *Muldoon K.C.* and *James Geoghegan*),
 for the prosecutor:—

Under 7 & 8 Geo. 4, c. 67, s. 6, the clerk was appointed by the
 justices alone, and held office at the pleasure of the justices. The
 Petty Sessions Clerk (Ireland) Act, 1858 (21 & 22 Vict. c. 100),
 leaves the power of appointment with the justices, but associates
 with them the Lord Lieutenant as to tenure of office. This does
 not give to the Lord Lieutenant power to prescribe regulations as
 to qualifications: it gives His Excellency power when the person
 has been elected to declare his tenure of office determined. It may
 be that the prosecutor could have challenged the Lord Lieutenant's

decision as to the first election (1). If the Lord Lieutenant gave no reasons for his decision in determining the tenure of office, no doubt his decision could not be challenged. Here his reasons for rejecting the prosecutor were based on regulations which were ultra vires. No qualifications can be prescribed which would interfere with the justices' power of selection. The extensions enacted by the statutes 41 & 42 Vict. c. 69, s. 6, and 7 Edw. 7, c. 22, show that the power of making rules conferred upon the Lord Lieutenant under sect. 21 of the Act of 1858 (21 & 22 Vict. c. 100) was limited, and that power could not extend to enable regulations as to qualifications to be made: *R. v. Saddlers' Co.* (2); *Cakler & Hebble Navigation Co. v. Pilling* (3); *R. v. Henderson* (4); *Rossi v. Provost of Edinburgh* (5).

Serjeant M'Sweeny K.C. and Devitt, for the Crown.

Leonard, for Captain Fitzpatrick, was not called on.

CAMPBELL L.C.J. :—

We do not think it necessary to call upon counsel for the Crown or for Mr. Fitzpatrick, as we are satisfied that the application in support of which Mr. Carrigan and Mr. Muldoon have argued is wholly untenable.

The application was based upon two grounds—1, that Mr. M'Morrow, the prosecutor, was not, in the circumstances, ineligible; and 2, in the alternative that, assuming that he was eligible, he had a majority of the qualified votes on the second election. It was evident at the outset of the argument, and to this Mr. Carrigan assented, that if we were against the prosecutor on the first ground, the second would not arise, and we are not to be taken as going into the merits on the second contention.

The facts, shortly stated, are as follows:—The prosecutor, M'Morrow, was one of several persons put forward for election for the post of Petty Sessions clerk at Drumkeerin, at an election held, I believe, in July last. On that occasion he appears to have obtained a majority of the votes, and, in accordance with the usual procedure in these cases, his name was sent forward to His

(1) Mr. Muldoon did not assent to this proposition; see post, p. 108.

(2) 3 Ell. & Ell. 42; 10 H. L. 404.

(3) 14 M. & W. 76.

(4) [1898] A. C. 720.

(5) [1905] A. C. 21.

K. B. Div. Excellency as the person elected at the meeting of the magistrates.
 1917. The Lord Lieutenant at once directed a communication to be sent
 R. to the magistrates, and to the prosecutor's solicitors, stating that
 (M'MORROW) he, the Lord Lieutenant, was not prepared to, and would not,
 v. sanction the appointment, M'Morrow being of military age. No
 FITZPATRICK. proceeding of any kind was taken by M'Morrow to test the
 Sir James validity of the Lord Lieutenant's determination in that particular
 Campbell C.J. case, and I pressed Mr. Carrigan as to why that was so, and as
 to whether, if his present contention were right, he was of opinion
 that his client could have come in and challenged in this Court
 that decision of the Lord Lieutenant, because the Lord Lieutenant
 on that occasion intimated, and indeed it was so stated in the
 communication to M'Morrow's solicitors, that his objection was
 based upon the ineligibility of M'Morrow by reason of his being
 of military age. Mr. Carrigan contended that it would have
 been open to M'Morrow to come in and test that decision, and
 that then precisely the same question, that is the question on
 the first ground of the present application, could have been dis-
 cussed as it has been before us. Mr. Muldoon, on the other hand,
 asserted the contrary, and contended, as I think rightly, that,
 having regard to the jurisdiction of His Excellency, M'Morrow
 had no remedy in this Court on that decision, and could never
 have obtained redress in this Court in respect of the refusal by
 the Lord Lieutenant to sanction the appointment on the first
 occasion; and Mr. Muldoon stated that it was settled law that, in
 the case of an office held at the pleasure of a particular individual
 or department, this Court could not investigate into or examine the
 reasons which influenced that person or department in the exercise
 of his or their pleasure that the tenure of the office should cease.
 That admission of Mr. Muldoon is borne out by settled authority.
 An effort was made in another case, in somewhat similar
 circumstances, by a person who had been elected by the magis-
 trates, and whose appointment His Excellency had refused to
 sanction, to obtain a mandamus directing the magistrates to
 declare him duly elected as the person who had obtained the
 majority of the qualified votes at the election. In that case,
Reg. (Whitely) v. Cork JJ. (1), Palles C.B. stated in his

judgment that the decision in *R. v. Griffiths* (1) was a conclusive authority that such a mandamus should not be granted, and he states the principle in his judgment as being that the Court will do nothing in vain, and will not order an act to be done which the party against whom the order is made could nullify. That is conclusive as to the jurisdiction of this Court to grant a mandamus to the magistrates to declare this gentleman elected, and indeed that is not the form of mandamus here asked for.

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The very same point was raised in an important case, which, I regret to say, is not reported in the authorized reports, upon a petition of right taken by Sir Thomas Brady. In that case, as appears from the report in 3 N. I. Jurist, 279, the facts were shortly these: Sir Thomas Brady was sixty-five years of age, and was Chief Inspector of Fisheries. The Executive called upon him to resign on the ground that he was sixty-five years old, and that the rule, familiarly called the "65 rule," applied to his case. A long correspondence ensued between Sir Thomas Brady's solicitors and the representatives of Her Majesty, in which Sir Thomas contended, supported by the opinions of many eminent counsel of the day, that the 65 rule did not apply to him, as he was head of a department. The Executive, in reply, contended that the rule did apply, and declined to retain him in office. He thereupon took his petition of right to have it established that the 65 rule did not apply to his case, and that he was, therefore, entitled to retain office. The Master of the Rolls, and subsequently the Court of Appeal, appear to have been of opinion that *proprio vigore* the 65 rule did not apply; but they held that his office was held at the pleasure of the Lord Lieutenant, and that this fact rendered superfluous any question as to the application of that rule, since the Lord Lieutenant could at any time express his pleasure that the tenure of the office should cease, and had, in fact, so declared. That was a case on a petition of right, and it established that in any case where an office is held at the pleasure of another, this Court cannot examine or investigate into the reasons which influenced the particular person or department in whom the pleasure is vested in exercising that pleasure to determine the office. The importance of the case is that it was there assumed

(1) 5 B. & Ald. 731.

K. B. Div. 1917. that the Lord Lieutenant, in declaring the tenure of Sir Thomas Brady determined, based his reasons for that determination upon an alleged misapplication of the law; but inasmuch as any order of the Court in favour of Sir Thomas Brady could have been set aside the next day by His Excellency declaring the tenure of the office to be there and then determined, the Court of Appeal, on that account as well as upon other considerations, held that they had no power to interfere. The law is so stated by Palles C.B. in his judgment: *Brady v. Queen* (1). "In my opinion," he says, "no Court has any power or jurisdiction to examine into the validity of the reasons that led a person, who had the power to determine an office, to exercise his power. The moment that the Court has arrived at the conclusion that, as a matter of fact, he did exercise it, and exercised it without attaching to the determination of the office any condition, then, in my opinion, what led up to the exercise of that power is not examinable." I shall also read a brief passage from the judgment of Lord Justice FitzGibbon at page 294. "I have arrived," he says, "at the same conclusion that he (the Lord Chief Baron) has done, namely, that we have no legal claim here to which we can give effect, because the petitioner's office was one held at pleasure, and that pleasure has been sufficiently expressed for its determination."

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Now, dealing with the present case, wholly apart from the second question argued by Mr. Muldoon as to the validity of the rules made by the Lord Lieutenant, what is the position? When this same gentleman was elected in July last, a few weeks before the second election which is now the subject of discussion, His Excellency plainly and expressly stated his view that in his opinion this gentleman was disqualified, and that he would remove him, and did remove him, from office. Supposing we assume that His Excellency took an entirely wrong view of the case, the authority of *Brady v. The Queen* (1) to my mind conclusively establishes that as this office is held at the pleasure of the Lord Lieutenant, neither this Court nor any other Court can examine into the reasons which influenced His Excellency in exercising his pleasure to determine the tenure. Let us take an example. Suppose that the magistrates came to the conclusion that an infant—I mean, of

(1) 3 N. I. J. 279 at p. 283.

course, an infant in the legal sense—was a fit and proper person to hold the office and elected him, and the Lord Lieutenant then wrote to the magistrates and to the elected person, stating that in his (the Lord Lieutenant's) view a minor was disqualified, but that, whether he was right in this view or not, it was his pleasure that the elected person should cease to hold office, Sir Thomas Brady's case is a conclusive authority, that in such a case there could never be in this or in any other Court jurisdiction to investigate into or examine the reasons which influenced His Excellency in the exercise of the power conferred upon him.

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Let us see for a moment the absurd result that would follow from any other view of the law and the position in which Mr. Muldoon's argument—that is his argument apart from the question as to the validity of the rules—would place this Court. The complaint here is that the prosecutor has been deprived of his chance to be a candidate at the second election, and that he was in fact elected by a majority of the magistrates qualified to vote. He is, therefore, not in a position to obtain a mandamus to compel the magistrates to elect him or to declare him elected, and he cannot proceed by quo warranto, as the office is held at pleasure. We are asked to give him a third election. If we do so, we are expressly informed by counsel for the Crown that if this gentleman then succeeded, His Excellency would act precisely as before and determine the office, an intimation we hardly required, seeing that His Excellency has declared his opinion that a gentleman of military age should not be allowed to hold this post. Suppose we grant the mandamus asked for and Mr. Muldoon's client is again elected, His Excellency would again remove this gentleman from office, and, according to Mr. Muldoon's contention, he could come in here again and say: "This is all wrong; give me a fourth election." That suggestion is to my mind preposterous, and we are all of opinion that it is destitute of authority. Even if we had jurisdiction to grant the mandamus asked for, which we do not think we have, we would only bring about an absurd result, and in no case ought we to make an order which, in fact, could not benefit the person who makes the application.

It was further contended—and indeed this was Mr. Muldoon's main argument, in connexion with which he referred to a familiar

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line of authorities dealing with repugnancy in by-laws, but of doubtful application in a case like the present—that in arriving at the determination that the prosecutor's tenure of office should cease, His Excellency acted upon certain rules and regulations published from time to time by him, prescribing certain matters with reference to Petty Sessions clerks which were ultra vires.

Before considering the validity of these rules I should like to say that in my view our determination on the first part of the case is sufficient for its disposal. Even if these rules were outside the power conferred by the Act of Parliament, we have the expression of his pleasure made by the Lord Lieutenant coupled with the reason and the only reason given by him for exercising that pleasure. We find that in the notice sent to M'Morrow, stating that in the opinion of His Excellency he was not eligible, there is no reference to any rule at all. Assuming, as we think is plain, that the prosecutor held office at the pleasure of the Lord Lieutenant, then we are satisfied on the first part of the case that we have no right or power to investigate into the reasons, be they good or bad, which influenced His Excellency in exercising his pleasure. That was his prerogative. He exercised the power conferred by the very statute which creates the office of Petty Sessions clerk, and no authority of any kind, sort, or description has been brought to our notice by counsel for the prosecutor to show or to suggest that this or any other court can examine into the reasons, given by the person in whom the power is vested, for exercise of that power.

It appears that from time to time rules were made by His Excellency, regulating certain matters with regard to the office of Petty Sessions clerk. The rules in force at the date of the two elections contained the following regulation:—"The limits of age of candidates seeking appointment as Petty Sessions clerks during the continuance of the war, and for six months thereafter, shall be forty-one to fifty years," and then follow certain exceptions, to which I need not refer. Subject to these exceptions, then, these regulations prescribe this limit of age. It has been boldly asserted here—and indeed most of the argument has been addressed to show—that this particular rule is ultra vires. The

power of the Lord Lieutenant to make rules is to be found in *K. B. Div.* sect. 29 of the Petty Sessions Clerk (Ireland) Act, 1858 (21 & 22 1917. Vict. c. 100), in those words:—"It shall be lawful for the Lord Lieutenant to make such general rules as shall seem to him (Mr. R. expedient for the purpose of carrying into effect the provisions of Fitzpatrick. of this Act, and from time to time to amend and vary such rules as Sir James Campbell C.J. occasion shall require." It is impossible to conceive any wider legislation for the purpose of leaving to the discretion of the Lord Lieutenant what he considers to be expedient as rules for giving effect to the Act. The power is not simply to make rules, but to make such general rules as he shall think expedient, and to vary these rules from time to time; and it is inconceivable and unthinkable that under such a power he had no jurisdiction to prescribe the limits of age of candidates. If he had such a jurisdiction, then it is not within the power of this Court to criticize or examine the exercise of it, even though we thought it to be drastic and unreasonable. Indeed, in view of the stupendous exigencies and needs of the present situation we regard the rule in question here as an eminently reasonable and proper rule; but, had we thought otherwise, it would not be open to this Court to interfere.

That statute was followed by a provision in sect. 6 of the Petty Sessions Clerks and Fines (Ireland) Act, 1878 (41 & 42 Vict. c. 69), which is as follows:—"The power of making general rules conferred upon the Lord Lieutenant by the twenty-ninth section of the principal Act shall be construed and extended so as to authorise the making from time to time of regulations defining the duties of clerks of Petty Sessions, and the mode of performing the same." Speaking for myself, I should have thought that that power had already been conferred by the 29th section of the previous statute; but it may well be that this extension was enacted to remove all doubts, and to prevent any question arising.

Mr. Muldoon has argued that under the power to make rules no regulations of any sort, kind, or description prescribing or imposing any test as to age, education, or any other qualification in respect of the candidates, could be made, because, he says, that would interfere with the power of the justices, who,

K. B. Div. according to his contention, are entitled to appoint, without
 1917. regard to any qualification, standard, or limit of age, anybody
 R. they regard as a fit and proper person. I asked in vain to be
 (M'MORROW) referred to some authority for the proposition that where, in a
 v. case of this kind, a public body, or board, or individual has a
 FITZPATRICK. statutory power to appoint a staff, and to make rules to give
 effect to the Act, that power would not carry the consequent
 Sir James right to prescribe the qualifications for officers. It seems to me
 Campbell C.J. to be a perfectly impossible conclusion to hold that the power
 conferred by sect. 29 of the principal Act excluded all right or
 power to prescribe any qualification, any condition, any educa-
 tional test, any limit of age for the purpose of giving effect to
 the Act, where the Act itself has no other object in view except
 the appointment of Petty Sessions clerks. We cannot hold that
 where the only purpose of the Act is the appointment of these
 clerks the power to make general rules for the purpose of carrying
 into effect that single purpose does not include the power to
 prescribe qualifications of any sort.

But I think this matter is effectually and finally determined
 by the provisions of the statute passed in 1907. It appears that
 under the previous statutes before this latter Act was passed the
 Petty Sessions clerks in the cases of Cork and Belfast were
 entitled to have assistant clerks, and these were the only two
 districts in Ireland so entitled by statute; but up to 1907 there
 was no power given to the Lord Lieutenant to make rules as
 to these assistants. In 1907 the Petty Sessions Clerks and
 Fines (Ireland) Amendment Act, 1907 (7 Edw. 7, c. 22), was
 passed, sect. 1, sub-s. 2, of which provides:—"The power of
 making rules conferred upon the Lord Lieutenant by sect. 29 of
 the said Act shall extend"—to what?—"to the making of such
 rules respecting the qualifications, salaries, and appointments of
 any such assistants hereafter to be appointed."

It seems to me that we must read and construe this provision as
 showing that the rule-making authority given under the earlier
 Act with regard to the chief officer is to be extended to the case of
 the assistant; and that it amounts to a statutory declaration that
 the antecedent power of making rules as regards higher office
 included the power to make regulations as to qualifications and

mode of appointment, and that that is the meaning and sense to be given to the word "extend." If that is so, this provision effectively and finally disposes of the whole of the argument addressed to us on the alleged invalidity of this rule, which prescribed the age limit as being between the ages of forty-one and fifty years. On every ground, therefore, we are of opinion that this application wholly fails, and that the conditional order must be discharged with costs. As this case is of general importance, we will not give costs to the Crown, but the prosecutor must pay the costs of the other parties who show cause.

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Solicitor for the prosecutor: *Patrick O'Flynn.*

Solicitor for the Crown: *The Chief Crown Solicitor.*

Solicitors for Captain Fitzpatrick: *Messrs. Fitzgerald & M'Cormick.*

C. N. K.

K. B. Div. THE KING (AT THE PROSECUTION OF MICHAEL HARRINGTON, R.I.C.) *v.* THE COUNTY COURT JUDGE AND CHAIRMAN OF THE QUARTER SESSIONS AND THE JUSTICES OF THE PEACE FOR THE COUNTY OF CLARE.

1917.

Nov. 21.

THE KING (AT THE PROSECUTION OF MICHAEL HARRINGTON, R.I.C.) *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY OF CLARE (1).

Justices—Jurisdiction (Petty Sessions)—Refusal to adjourn complaint—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93)—Improper exercise of discretion as to adjournment—Imposing costs as a condition to adjournment—Certiorari—Court improperly constituted—Bias—Failure to object at hearing to the constitution of Court—Presumption of waiver rebutted by proof of surprise—Reasonable time for preparing defence—Costs against justices.

Certiorari lies to quash a decision of justices on the ground that the justices improperly exercised their discretion as to the adjournment of the complaint. *R. (Roche) v. Cork JJ.* (46 I. L. T. R. 80) must be taken as conclusively establishing that, in all cases coming under the provisions of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), justices cannot impose the payment of costs as a condition to an adjournment of the complaint. *Quære*, whether such conditional adjournment can be granted by consent of the parties.

There is no absolute rule of law that a party cannot challenge a decision of justices on the ground of bias or suspicion of bias where the objection on either ground was present to his mind at the hearing before the justices and was not then made by him or on his behalf. In such case there is a presumption *juris* of waiver of the objection to the constitution of the court, but this presumption of waiver may be rebutted by proof that the party was prevented by surprise from taking the objection before the justices, either by reason of their improper conduct or neglect of the essentials of justice.

Where a decision of justices is quashed on the ground of improper refusal by them to adjourn the hearing of a complaint, as well as on the ground of suspicion of bias on the part of one of the justices adjudicating, costs may be given against all the justices who concurred in the refusal to adjourn.

A police constable was served with a summons three days before the Petty Sessions, and had not received official permission to employ a solicitor at the date when the summons came on for hearing. He had been continuously employed on police duties between service of the summons and the hearing, it was held on motion to quash the conviction, that the constable had not had reasonable time for the preparation of his defence, and that the justices should have allowed the hearing of the complaint to be adjourned.

(1) Before SIR J. CAMPBELL C.J., MADDEN and DODD JJ.

CERTIORARI.

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R.

(If any)

TOS)

v.

JUSTICES OF
CO. CLARE.

Motions to make absolute two conditional orders for writs of certiorari, directed respectively to the justices of the peace for the County of Clare, and to the County Court Judge and chairman of Quarter Sessions and the justices of that county, to bring up for the purpose of being quashed the records of a conviction at the Killaloe Petty Sessions on the 24th July, 1917, of the prosecutor for an assault on one John Scanlan, and an order of the Ennistymon Quarter Sessions of the 5th October, 1917, confirming that conviction.

The prosecutor was an acting sergeant of the Royal Irish Constabulary, and was stationed at Killaloe. On the night of the 11th July, 1917, he with other members of that police force, to the number of about seventy-five, under the orders of District Inspector M'Clelland and two other officers, were on duty at the bridge leading to the town of Killaloe from Ballina. The result of the Parliamentary election for the East Clare Division was declared on the 11th July, 1917, the candidate who secured the majority of votes being Mr. De Valera, a prominent Sinn Féin leader. On the evening of that day a large crowd, numbering, it was stated, about 1300 persons, marched in procession from Killaloe to Ballina and back. The crowd was in military or quasi-military formation, and was noisy, cheers and party cries being continuously raised by its members. A Mr. Rohan, then a justice of the peace for the county and district, and John Scanlan were members of the procession. On their return to Killaloe the processionists were headed by a party bearing a lighted tar-barrel, and they were stopped by the police, by direction of District Inspector M'Clelland, who stated that he would not permit the barrel to be carried into the town. The tar-barrel was then abandoned, and some little time later the crowd, having crossed into Killaloe, dispersed.

On the 21st July, 1917, a Saturday, John Scanlan took out a summons, which was signed by Rohan, charging the prosecutor with an assault upon him on the night of the 11th July, and requiring the prosecutor to appear at the Killaloe Petty Sessions, to be held on the 24th July following. This summons was left with the prosecutor's wife at 5.30 p.m. (new time) on Saturday, the

K. B. Div. 21st July. The prosecutor was then on duty, and was handed the
 1917. summons by his wife on his return home at 10.30 p.m. (new time)
 R. the same evening. On the following day, Sunday, the 22nd July,
 (HARRING- owing to the proclamation of a meeting, a considerable body of
 TON) police and military was on duty in the town of Killaloe, and the
 v. prosecutor was continuously engaged all day on police duties.
 JUSTICES OF Co. CLARE. He, however, informed his officer, District Inspector M'Clelland,
 of the summons, and requested him to forward an application for
 permission to employ a solicitor, such permission being required by
 the rules of the Constabulary. The request was duly forwarded
 to the authorities, but the permission had not arrived on the
 24th July, when the case came on for hearing.

When the case came on on the 24th, Mr. Rohan, two other
 justices, and the resident magistrate, Mr. Kelly, were on the bench.
 The complainant's solicitor stated he was not ready to go on, as
 an important witness for the complainant was not present, and on
 his request the case stood over in order to enable this witness to
 be present. When the case was again called this witness had not
 arrived, and the complainant's solicitor then stated that he would
 go on without him. The prosecutor then applied for an adjourn-
 ment. The exact grounds on which he based his application were
 in controversy; but it was admitted that he stated he wished to
 employ a solicitor, and that he had not then obtained the requisite
 permission; and District Inspector M'Clelland, who was in Court
 on duty, swore, in his affidavit in support of the application for
 the certiorari, that he had supported the prosecutor's application
 for adjournment, and had stated to the bench the rule as regards
 the employment of solicitors by members of the Constabulary
 Force, and also the circumstances under which the prosecutor had
 been continuously employed on police duties from the time of the
 receipt of the summons. The complainant's solicitor opposed the
 application for an adjournment, stating that notice of intention to
 apply for such adjournment should have been given by the prose-
 cutor to him or to his client, and that the prosecutor had abundant
 time to give such notice. The solicitor, however, offered to agree
 to an adjournment on the payment by the prosecutor to him of
 £1 for costs. The bench, with the exception of the resident
 magistrate, who was in the prosecutor's favour as to the application,

refused to grant the adjournment on the ground that notice of intention to apply should have been given; but they offered to allow the case to be adjourned if the prosecutor would pay to the complainant's solicitor £1 for costs. This the prosecutor refused to do, and the case went on. The prosecutor called no witnesses, and made no objection as to bias on the part of Mr. Rohan, and merely shortly cross-examined the complainant. At the conclusion of the hearing, the justices retired to consider their decision, and on their return the resident magistrate announced that the three other justices had concurred in convicting the prosecutor, but that he dissented. The conviction was thereupon entered in the book, with the following note:—"Mr. Kelly dissenting on the ground that defendant applied for an adjournment, not being prepared to go on with the case, having received the summons only on the evening of the 21st July, 1917."

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The prosecutor within the time limited for appeal duly served his notice of intention to appeal to the Ennistymon Quarter Sessions, to be held on the 5th October, 1917. Prior to the expiry of the time for serving notice of intention to prosecute the appeal the prosecutor withdrew his appeal, and notice of withdrawal was duly given to the Clerk of the Crown and Peace. By some oversight the appeal was not removed from the Crown book, and it was called at the Quarter Sessions held at Ennistymon on the 5th October, 1917. Nobody appearing for appellant or respondent, the Court thereupon made an order: "Conviction affirmed."

The conditional order for certiorari to quash the conviction was obtained on the following grounds:—"1. That the said summons was not served a reasonable time before the hearing within the meaning of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93, sect. 12). 2. That the said Court disregarded the essentials of justice in refusing to grant an application for an adjournment in the circumstances. 3. That the Court as constituted by the inclusion of the said Patrick Rohan on the hearing of the said complaint was biassed. 4. That there was reasonable apprehension that the said Patrick Rohan was biassed."

The conditional order for certiorari to quash the order of the Quarter Sessions was obtained on the ground that that order had been made without and in excess of jurisdiction.

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W. G. Gibson K.C. (with him *Kinahan*), for the prosecutor:—

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The prosecutor had not a reasonable time for the preparation of his defence. The assault was alleged to have taken place on the 11th July. The summons was not served until the evening of the 21st—a Saturday—and the case was listed for hearing on Tuesday, the 24th. The prosecutor subsequent to the service of the summons was continuously employed on police duties of a highly important character, and his application for leave to employ a solicitor had not been granted when the hearing came on. The complainant's solicitor was allowed time to get the attendance of an "important" witness, and could have gone on, as the events showed, without that witness. No doubt there is a discretion in the justices as to the granting of adjournments; but that is a judicial discretion, and cannot be exercised unreasonably, or in disregard of the essentials of justice: *R. (Poe) v. Clare JJ.* (1). In any case the justices had no power to impose a condition as to the payment of costs: *R. (Roche) v. Cork JJ.* (2). No doubt the prosecutor did not object to Rohan's presence on the bench; but the presumption of waiver in such circumstances is rebuttable, and it is clear that the prosecutor was taken by surprise when the justices improperly refused to grant his application for an adjournment. The Court has power to control the justices, and to prevent their action from being an abuse of justice: *R. (Poe) v. Clare JJ.* (1); *R. v. Surrey JJ.* (3); *R. v. Gaisford* (4); *R. (Giant's Causeway Tram Co.) v. Antrim JJ.* (5); *R. (Malone) v. Tyrone JJ.* (6).

Joseph O'Connor, for the justices:—

The summons was served in abundant time to enable the prosecutor to prepare his defence. It does not appear whether he had any defence to make. He does not state in his affidavits that he did not commit the alleged assault, and there is a controversy as to whether he stated as a ground for adjournment that he desired to call witnesses. The only ground for his application, which the resident magistrate, who was in favour of the

(1) 40 I. L. T. R. 121.

(2) 46 I. L. T. R. 80.

(3) L. R. 5 Q. B. 466.

(4) [1892] 1 Q. B. 381.

(5) [1895] 2 I. R. 603.

(6) 3 N. I. J. R. 177.

adjournment, recollects as having been made was the prosecutor's wish to employ a solicitor. The justices had an absolute discretion as to granting the adjournment: *Ex parte Biggins* (1); *R. v. Glamorgan JJ.* (2); and there is no reported case in which that discretion has been interfered with.

The prosecutor should have taken his objection at the hearing to Mr. Rohan adjudicating. The facts suggesting bias, to which he deposes in his affidavits, must have been acutely present to his mind. He is a police constable, used to proceedings in the Court, and he had his district inspector available, who, no doubt, could have advised him to take that objection. There was no element of surprise here as in *R. (Poe) v. Clare JJ.* (3); and the objection as to suspected bias on Rohan's part must be taken as waived: *R. v. Richmond JJ.* (4).

Kinahan, for the prosecutor, was not called on to reply.

SIR JAMES CAMPBELL C.J. :—

We do not think it necessary to call on counsel for the prosecutor to reply in this case. The facts are shortly as follows :—

On the 31st July last a summons was issued and served on the same evening on the prosecutor, a serjeant of the Royal Irish Constabulary, charging an assault which it was alleged was committed by him some ten days previously. The summons came on for hearing on the 24th July before a Court of Petty Sessions, consisting of four justices, of whom the resident magistrate was one and a man named Rohan another. When the case was called upon the 24th the solicitor for the complainant said he was not ready to go on, as a witness who is described in the affidavits as an important or principal witness for the complainant was not present, and he asked for an adjournment for the purpose of securing the attendance of that witness. To that the bench agreed. When the case came on again this witness failed to appear, and the complainant's solicitor elected to go on without him. The defendant, the police serjeant, then came forward and stated he

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(1) 26 J. P. 244.

(2) 53 J. P. 435.

(3) 40 I. L. T. R. 121.

(4) 3 Cox, 314.

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was not ready to go on, as he had been continuously employed on police duties since the 21st, when he had received the summons and had not had time to prepare his defence. It is also alleged that he said that he desired to employ a solicitor, and had immediately upon being served with the summons applied for the necessary consent to his so doing, but, through no default on his part, it had not yet arrived. The precise nature of the case made by the sergeant for the adjournment is in controversy between him and the complainant's solicitor; but there is one point which is not contradicted, namely, that the District Inspector, who was in court in uniform on duty, came forward and with great propriety informed the justices what the rule was as regards police constables and other members of the force employing solicitors to assist them, and that the sergeant's request for a solicitor had been forwarded to Dublin, but that no reply had been received. He also explained the duties which the sergeant had been employed upon, and that the sergeant had no time to apply himself to the preparation of his defence. The solicitor for the complainant opposed the adjournment, but he does not appear to have alleged, nor does he now in his affidavit allege, that the grounds put forward in support of the application for adjournment were inaccurate, or that the defendant had had a reasonable time to prepare his defence. Indeed he impliedly admits the contrary by suggesting that had he received notice beforehand, the application would not have been opposed. We are satisfied that the sergeant had not a reasonable time for the purpose, and the justices do not state that he had. They give no reason for their refusal to grant the adjournment, based on any allegation that the sergeant had ample time for preparing his defence, nor do they dispute the reasons which he gave for his application. The justices offered to grant the adjournment on the terms of the sergeant paying to the complainant's solicitor £1 for costs; to that the sergeant would not agree.

This case incidentally raises the question as to the power of the justices to saddle with the costs a person to whom they grant an adjournment. How far that may be done by consent it is not necessary to decide in view of the present state of the law, as it has been decided that justices have no power to

impose a condition as to payment of costs when granting an adjournment. I have carefully considered the case of *R. (Roche) v. Cork JJ.* (1), not as it is reported in the Irish Law Times, but as it is recorded in the Court documents, and I am satisfied that that net point was there decided, and that therefore justices have no power to impose any condition as to payment of costs by the party to whom they grant an adjournment (2).

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The justices having refused his application the case went on, and the sergeant having no other alternative made the best cross-examination he could, and the case concluded. The justices having retired to consider their decision returned, and the resident magistrate stated that three of the four justices had decided to convict, but that he dissented, and the defendant was thereupon convicted, the resident magistrate dissenting, and recording in the book his dissent and the reasons for that dissent.

Some time later, within the time limited for appeal, the sergeant gave notice of his intention to appeal to the Quarter Sessions, but, before the expiration of the seven days within which he had to give notice of his intention to prosecute his appeal, he withdrew the appeal, and the notice of withdrawal having been received by the proper officer, the Clerk of the Crown and Peace, the appeal thereupon died. By some oversight, in respect of which no imputation can be attached to anyone, by an accident such as may occur even with the most careful officer, the appeal was not removed from the Crown Book, and it came up before the chairman and justices at Quarter Sessions. There was no appearance for or by either party, and an order was thereupon made, "Conviction affirmed."

(1) 46 I. L. T. R. 80.

(2) The Court records show that in *R. (Roche) v. Clare JJ.*, the prosecutrix, Susan Roche, obtained a conditional order for certiorari to quash an order dated 10th January, 1912, made on a complaint by one Michael Crowe against her. One of the grounds relied on for quashing this order was that it being an order for an adjournment, the justices had no power to order the payment of costs. The order of 10th January, 1912, in fact only ordered an adjournment for fourteen days on the application of the solicitor for the prosecutrix, and that the prosecutrix should pay Michael Crowe £1 for costs. By order of the King's Bench Division, dated 16th February, 1912, the conditional order for a writ of certiorari to bring up and quash the justices' order of 10th January, 1912, was made absolute.—[RKP.]

K. B. Div. In the circumstances that order was wholly illegal, as the appeal
 1917. was not before the Quarter Sessions, and the chairman and
 R. justices had no power to make any such order. Accordingly, we
 (HARRING- are asked now to quash the order of the Quarter Sessions, and,
 TON) very properly, no one has appeared to show cause We, there-
 v. fore, make absolute the conditional order for a certiorari to bring
 JUSTICES OF up and quash the order of Quarter Sessions, but without costs.
 Co. CLARE.
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We are asked to quash the order of conviction made at the Petty Sessions on three grounds. 1, that the defendant was not given a reasonable time for his defence; 2, that the defendant was refused an adjournment, which the justices should have granted; and, 3, bias on the part of the tribunal which heard the case. In my opinion the first two grounds overlap, because, in all the cases I have been able to find, the discretion of the justices to refuse to grant an adjournment arose in connexion with the consideration by the Court of whether the defendant had had reasonable time. In almost all these cases where the question of reasonable time has been discussed the question of the refusal by the justices to adjourn the case has been part of the matter for consideration. That is the reason why Mr. O'Connor was able to state that there appeared to be no case reported in which the Court had been asked to interfere with the discretion of the justices as to granting or refusing adjournments. It will be found, however, that in ninety-nine out of one hundred cases where the question of reasonable time has been considered by this Court the defendant had applied for an adjournment, and had been refused.

The question whether the defendant had in fact reasonable time, of course, depends in every case on the particular facts. In an ordinary case, no doubt, where a summons is served on the 21st, which is not to be heard till the 24th, there might well be a reasonable time for the preparation of the defence; but this was not an ordinary case, and the justices had the facts before them as to the peculiar circumstances arising out of the continuous employment of the defendant on his police duties in the interval between service and hearing. The moment they had the facts before them they ought to have given effect to his application. I do not think the justices could really have

appreciated these facts in the circumstances, and, in common justice, they ought to have granted an adjournment to permit the defendant to consider his defence, and get the assistance of a solicitor. It is alleged that the sergeant made no statement that he required the attendance of witnesses. Very likely he did not. On the whole, I am inclined to think he did not make that statement; but his officer made it for him. The sergeant, however, stated that he wished to employ a solicitor, and that solicitor might very possibly require the attendance of witnesses, especially as the assault with which the sergeant was charged was alleged to have taken place in circumstances which could have been witnessed by several policemen and others.

We are of opinion that in refusing to grant the adjournment the justices failed in their duty on two grounds: 1, because in fact the defendant had not had a reasonable time for the preparation of his defence; and, 2, as a result of that fact he was clearly entitled to have the case adjourned to give him that time.

The only point that remains for consideration is that as to bias. I would be slow to qualify in any way or interfere with the well-settled rule which has been acted upon by this Court, namely, that where a decision is challenged on the ground of bias in the tribunal which gave it, this Court will not interfere where it appears that the fact or suspicion of bias was present to the mind of the challenging party at the hearing before the tribunal, and the point as to bias or suspected bias was not made by or on his behalf at the hearing by that tribunal. It may well be that in cases like the case of *R. (Malone) v. Tyrone J.J.* (1), to which my brother Dodd referred, where this Court thought it right to interfere on account of the scandalous state of affairs disclosed by the affidavits, this Court would interfere in any case in which a similar scandal was proved, although the party concerned did not object at the original hearing, and might be taken to have waived his objection as to bias. There may be, however, other circumstances to qualify the application of the wholesome rule to which I have referred—such as surprise of the party. Where the party applies for an adjournment on proper grounds and in circumstances in which this Court considers he was entitled to get that adjournment, and he is

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refused, it may well be that the party is by that refusal so taken by surprise that he forgets to make the technical objection as to bias, or is so taken aback by the injustice which he has suffered that he would wash his hands of the tribunal. Be that as it may in circumstances which are very similar to those in this case, it was decided in *R. (Poe) v. Clare JJ.* (1) that surprise of that kind, in view of the circumstances of the case and the refusal by the justices to grant an adjournment which it was proper to grant, would entitle this Court to hold that there had been no waiver, although the party challenging the order of the justices had not taken his objection as to bias at the hearing at Petty Sessions.

Was there then any bias or suspicion of bias on the part of the Court which tried the summons in this case? It is not necessary to decide that there was actually bias, as it is clear that one of these justices had placed himself in a position in which it was difficult, if not impossible, for him to adjudicate impartially. He himself took part in the procession in connexion with which the assault was alleged to have been made. That procession appears to have been of a highly seditious and improper character; and, while there is some controversy as to some of the cries of the processionists, there is no doubt as to others. The general nature of the procession appears to have been undoubtedly unlawful and seditious. Mr. Rohan not only signed the summons against the sergeant, but also took his seat on the bench and adjudicated on a complaint in connexion with this very procession in which he had actually been a participant; and we are, therefore, satisfied that he placed himself in a position in which there was danger of bias on his part, and, accordingly, that he was disqualified from acting as a justice at that hearing.

All the justices present and adjudicating, except the resident magistrate, concurred with Mr. Rohan in his decision, and they were members of the Court in which Mr. Rohan was disqualified to sit and adjudicate. We will, therefore, make absolute the conditional order for certiorari, with costs, against all the justices present except the resident magistrate.

Solicitor for the prosecutor: *Henry Shannon.*

Solicitor for the justices: *H. O'Brien Moran.*

C. N. R.

DISTRICT-INSPECTOR JEREMIAH T. WALLACE, APPELLANT, *K. B. Div.*
v. ADAM BURROWS, RESPONDENT (1). 1917.

Nov. 22.

War—Emergency legislation—Defence of the Realm Regulation 2 F.—Flour and Bread (Prices) Order, 1917—Maximum price of bread—Reasonable additional charge for making delivery—Delivery—Bread sold from a travelling van.

Under clause 5 (b) of the Flour and Bread (Prices) Order, 1917, which allows a reasonable charge for making delivery in addition to the maximum price of bread fixed by clause 5 (a), delivery in respect of which such additional charge may be made must be delivery other than and in addition to the act of the delivery of the bread to a purchaser across the counter or on a sale from a travelling van.

CASE STATED under 20 & 21 Vict. c. 43.

The facts and law applicable to the case may be summarized as follows:—

Under sect. 2 F of the Defence of the Realm Regulations the Food Controller is enabled to make orders as to, inter alia, the maximum prices to be charged for bread. Under that power, an order made by the Food Controller, and published in September, 1917, known as the Flour and Bread (Prices) Order, 1917, provided as follows:—"On and after the 17th September, 1917, no flour or bread may be sold at prices exceeding the maximum prices applicable under the provisions of this order, or on terms involving the payment of higher or other charges than those permitted under this order. 5 (a). The maximum price of bread shall be at the rate of 2½d per lb. (b). A reasonable additional charge may be made for giving credit or for making delivery. 19. Infringements of this order are summary offences against the Defence of the Realm Regulations."

On the 25th October, 1917, the defendant was charged before the Court of Petty Sessions at Newtownards with having sold in Newtownards, on the 28th September, 1917, to the complainant,

(1) Before MADDEN and DODD JJ.

K. B. Div. Sergeant Michael Duffy, R.I.C., two 2-lb. loaves of bread at a price exceeding the maximum price fixed by the Flour and Bread (Prices) Order, 1917, to wit, at the price of $9\frac{1}{2}d.$ for the two loaves. The respondent was represented by a solicitor, Mr. M'Cutcheon; and the prosecution was conducted by the District Inspector of the Royal Irish Constabulary. The only witness examined was the complainant Duffy, who deposed to having stopped the respondent in the street of Newtownards on the 28th September, 1917, and to having then asked the respondent at what price he was selling bread. Respondent was then in charge of a bread-van, and was, it appeared, employed as a van-man or bread-server by a firm of bakers in Belfast. The respondent told the sergeant he was charging at the rate of $4\frac{3}{4}d.$ for the 2-lb. loaf, to which the sergeant replied that that price was in excess of the maximum price allowed by the order, namely, $2\frac{1}{4}d.$ per lb. The respondent then stated that his instructions were to sell at that price, and the sergeant then bought two 2-lb. loaves from the respondent, paying the latter $9\frac{1}{2}d.$ for the bread. For the defence the respondent's solicitor contended that the $\frac{1}{4}d.$, which was in excess of the maximum price, was a reasonable charge for delivery, as allowed by clause 5 (b) of the order; that such charge could be made on every sale except sale across the counter; and that the cost of delivery was incurred when the loaves were placed in the van. The justices dismissed the complaint on the merits. The case was stated at the instance of the District Inspector for the determination of the question whether the justices were right in point of law in so deciding.

Devitt (with him *Serjeant Matheson K.C.*), for the appellant:—

There was no delivery in the sense intended by clause 5 (b) of the Flour and Bread (Prices) Order, 1917. There was on the facts no delivery at all, but a direct sale, just as in a shop across the counter. The respondent's instructions were to "sell at those prices," and he actually did sell to the sergeant. It is clear that the respondent was not merely delivering bread, ordered by his masters' regular customers, he was prepared to sell on his rounds, and to sell only at the price which exceeded the maximum price allowed.

Tobias and D. M. Wilson K.C., for the respondent:—

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There is no definition of "delivery" in the order; the meaning to be attached to that word must be derived from the usual practice of the trade, and by the application of common sense. The order contemplates compensating the trader for the expense and trouble of delivery, whether that delivery be to regular customers or to the public generally. This is not a sale across the counter in a shop where the customer can take away the goods. Here the bread is brought at the expense of the trader to the customer who is inconvenienced by this practice; and it is submitted that even where there is such a sale as here there is the delivery which the order intends.

MADDEN J.:—

In this case the respondent was in charge of a bread-van, the property of a firm of bakers in Belfast, when he was stopped, on his daily round in the town of Newtownards, by a police sergeant, who asked him at what price he was selling bread. The respondent replied that he was selling at $4\frac{3}{4}d.$ for the 2-lb. loaf, and $9\frac{1}{2}d.$ for the 4-lb. loaf. The sergeant, who, I assume, was appointed to the duty of seeing that the food regulations were complied with, said that those prices exceeded the maximum prices allowed by the Bread Order of 1917. The respondent replied that his instructions were to "sell at those prices," and a sale was made to the sergeant of two 2-lb. loaves at $9\frac{1}{2}d.$ for the two—that is at $4\frac{3}{4}d.$ for each loaf. It is plain, from the evidence in the case, that the bread-van was converted into a travelling shop, in which bread was sold to a customer in excess of the maximum price allowed by the Bread Order. It is apparent that if the practice deposed to were allowed to continue it would make possible wholesale evasions of regulations made in the interest of the general public, by which the maximum price of bread was fixed, and that it would lead to unfair and injurious results affecting shopkeepers in a town like Newtownards who were obeying those regulations, and selling bread in their shops at the maximum prices allowed. In my opinion what actually took place in this case was a sale of bread to a customer. There was no delivery of the loaves

K. B. Div. within the meaning of the Order. The justices apparently considered that the handing of the bread to the purchaser was enough
1917. to constitute delivery, but that is not enough to constitute delivery
WALLACE to constitute delivery, but that is not enough to constitute delivery
v. as dealt with by these regulations. The wording of the Order
BURROWS. makes it perfectly clear what is the delivery in respect of which
Madden J. charges can be made. Clause 5 (a) of the Flour and Bread
(Prices) Order, 1917, provides that the maximum price of bread
when sold to a customer shall be at the rate of $2\frac{1}{4}d.$ for the
pound. In one sense a loaf sold to a customer across the counter,
or from a travelling van, is delivered to the purchaser; but that
is not the delivery for which an extra charge can be made.
Clause 5 (b) provides that a reasonable additional charge may be
made for giving credit or for making delivery. That delivery
appears, from the terms of the order, to be a delivery other than,
and in addition to, the act of delivery of a loaf to a customer in
a sale in the shop. In the present case there was nothing but
a sale of the bread. There was no delivery to a customer who
had ordered the bread, and got delivery by the van. In this
case the van was used as a travelling shop, with the result that
the maximum price allowed on a sale to a customer was exceeded,
and there was no delivery in respect of which the additional charge
could lawfully be made.

The justices were, therefore, wrong in point of law in dismissing the complaint on the merits, and the case will be remitted to them to be dealt with according to law.

Solicitor for the appellants: *The Chief Crown Solicitor.*

Solicitors for the respondent: *Wheeler & M^cCutcheon.*

C. N. K.

R. (LISMORE GUARDIANS) v. THE LOCAL GOVERN- K. B. Div.
MENT BOARD (1). 1917.

Nov. 14, 15,
29.

Local Government—Discretion of Local Government Board—Appointment of medical officer—Extraneous considerations—Jurisdiction—Poor Relief (Ireland) Act, 1851 (14 & 15 Vict. c. 68), s. 8.

The L. Guardians appointed C., a man of military age, to be medical officer of the T. dispensary district. The Local Government Board refused to sanction his appointment "in view of the constant and increasing need for the services of medical men with His Majesty's forces."

Held, that the Local Government Board, if satisfied that adequate medical relief for the sick poor was secured, might in the exercise of the discretion conferred on them by s. 8 of the Poor Relief (Ireland) Act, 1851 (14 & 15 Vict. c. 68), require that the appointment of medical officers during the war should be confined to persons over military age.

The Court being satisfied that in the present case the Local Government Board had exercised their discretion with due regard to the needs of the sick poor, *held*, that the action of the Board could not be questioned on the ground that they also had taken into consideration the national and military exigencies arising from the war.

R. (Keelun & Carraher) v. Local Government Board, 5 N. I. J. R. 81, applied.

Quære, whether the Local Government Board in exercise of such discretion are not acting administratively and not in a judicial capacity.

MANDAMUS.

The following statement of the facts is taken from the judgment of SIR JAMES CAMPBELL C.J. :—

The medical officer for the Tallow Dispensary District, Dr. Michael J. Kenny, became incapacitated through illness, and thereupon the Lismore Board of Guardians, by resolution of 17th November, 1916, appointed Dr. John Dwyer, the medical officer of the adjoining Ballyduff Dispensary District, to do duty during Dr. Kenny's illness, and this appointment was duly sanctioned by the Local Government Board on 27th November, 1916.

(1) Before SIR JAMES CAMPBELL C.J., GIBSON and KENNY JJ. The case was argued on July 27, 1917, and re-argued before the same Court on November 14 and 15, 1917.

K. B. Div. Dr. Kenny having died upon the 28th January, 1917, Dr. John
 1917. Dwyer was further appointed to discharge the duties pending a
 R. new appointment. The guardians then invited applications for
 (LISMORE the vacancy, their advertisement stating that the person to be
 GUARDIANS) appointed would be appointed only for the duration of the war,
 v. and in the result three applications were received, all three
 L. G. B. applicants being of military age. By resolution of the Guardians
 of 16th February, 1917, Dr. Thomas M. Cronin, one of the three
 applicants, was appointed to the vacant position for the duration
 of the war, and application was duly made to the Local Govern-
 ment Board for their approval of this appointment. Prior to all
 these proceedings two circular letters, one dated 26th November,
 1915, and the other 22nd September, 1916, had been addressed
 by the Local Government Board to the clerk of each union
 throughout Ireland. The first of these letters read as follows:—
 “The Local Government Board for Ireland desire to bring under
 special notice the fact that a large number of Irish medical prac-
 titioners are at present on temporary service with the Army and
 Navy, and that in consequence there has been since the outbreak
 of the war a marked dearth of candidates for Poor Law medical
 appointments. Furthermore, the making of these permanent
 appointments during the continuance of the war appears to the
 Board to be inequitable to the doctors who, out of motives of
 patriotism and humanity, have placed their services for the time
 being at the disposal of the Government. The Local Government
 Board would therefore suggest that the Board of Guardians should
 defer filling up any further vacancies that may occur, and should
 instead make the best temporary arrangement possible, pending
 the return of normal conditions on the termination of the war.”
 The second letter is much longer, and I need not read it in extenso.
 It expresses the Board's regret that the guardians in making
 temporary appointments to vacancies and providing substitutes
 for the medical officers who have volunteered for service in the
 Army Medical Corps have usually appointed newly qualified
 practitioners who were themselves of military age. It proceeds
 to emphasize the urgency of the need for more medical men for
 the Army, and to ask the guardians in view of this supreme con-
 sideration to avoid giving any inducement to medical men of

military age to seek for these civil appointments when other *K. B. Div.*
suitable and satisfactory arrangements can be made. It then 1917. _____
expresses the opinion of the Board that in all future vacancies R. _____
during the war, whether permanent or temporary, the guardians (L. MORE
GUARDIANS) should when possible assign the post to a local doctor holding v.
some other permanent appointment, or that the duties should be L. G. B.
divided between two or more such medical officers, and that only
as a last expedient should a separate medical officer be appointed,
and the selection, in that case, limited to persons over military
age. In reply to the request by the guardians for the sanction
of Dr. Cronin's appointment a correspondence ensued between
them and the Local Government Board, the material letters from
which seem to me to be as follows:—Letter 1st March, 1917,
from Local Government Board, pointing out that Dr. Cronin is a
recently qualified practitioner of twenty-six years of age, and that
the services of many doctors were most urgently required in the
R.A.M.C. It went on to say that the guardians were in a position
to provide for the medical care of the sick poor of the Tallow
district by continuing the services of Dr. Dwyer, and that the
Board declined to sanction the temporary appointment of Dr. Cronin.
The guardians having considered this letter replied as follows:—
“The guardians unanimously request the Local Government Board
to sanction Dr. Cronin's temporary appointment, as they consider
it would be physically impossible for Dr. Dwyer to continue to
discharge the duties of the two districts owing to the extent and
the distance to be travelled over and their mountainous nature,
also having two dispensaries to be attended to in the Tallow
district. The guardians guarantee that if Dr. Cronin at any time
during the progress of the war offers his services to the R.A.M.C.
they will not hold him to his appointment, and will give him
every possible facility to do so.” This was followed by a letter
from the Local Government Board of 14th March, 1917, stating
that “in view of the constant and increasing need for the services
of medical men with His Majesty's Forces, they are unable to
alter their decision.”

K. B. Div. *W. G. Gibson K.C.* (with him *W. Carrigan K.C.* and *William Shannon*), for the prosecutors:—

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L. G. B. Dr. Cronin's appointment is necessary for the adequate relief of the sick poor in the Tallow dispensary district. He is upwards of twenty-one years of age, and has every qualification prescribed by the regulations of the Local Government Board. It is not suggested that he suffers from any personal disqualification, physical or otherwise. Nevertheless, the Local Government Board have declined to approve of his appointment. They say that Dr. Cronin is of military age and eligible for service in the Royal Army Medical Corps, and that they cannot sanction his appointment in view of the constant and increasing need for the services of medical men with His Majesty's forces. The prosecutors contend that the Local Government Board have not exercised the discretion vested in them according to law, inasmuch as they have either disregarded, or subordinated to extraneous considerations, the provision of efficient medical relief for the sick poor of the dispensary district.

Sect. 8 of the Poor Relief (Ireland) Act, 1851 (Medical Charities Act) (14 & 15 Vict. c. 68) (1), as amended by sect. 2 of the Local

(1) Sect. 8:—"The Guardians of the Union shall . . . provide a house, building, room or rooms, to be used as a dispensary or office for the medical officer of each such district, and for the meetings of the committee of management, and shall provide such medicines and medical appliances as may be necessary for the medical relief of the poor in the said district, and the committee of management shall appoint, from time to time, subject to the approval of the [Local Government Board], one or more medical officers for the said district, with such qualifications as the [Local Government Board] shall determine, and with such salaries as the Guardians, subject to the approval of the [Local Government Board], shall determine; and the [Local Government Board] may, and they are hereby empowered, when they see occasion from time to time to regulate the amount of salaries or allowances payable to such officers respectively, and the time and mode of payment thereof; and it shall be lawful for the [Local Government Board] to remove any such medical officer on sufficient grounds, and to direct the said committee of management to appoint another medical officer in his stead; and, on failure of the said committee to appoint a medical officer of such dispensary district for one month after the receipt of the direction of the [Local Government Board], it shall be lawful for the [Local Government Board] to appoint such medical officer by an order under their seal."

Government (Ireland) Act, 1872 (35 & 36 Vict. c. 69), provides that the appointment of medical officers shall be subject to the approval of the Local Government Board, and that they shall have such qualifications as the Local Government Board shall determine. Sect. 12 of the same Act empowers the Local Government Board to frame general rules and regulations for the government of each dispensary district, and for the guidance and control of the guardians, the committees of management, and the several officers to be appointed in connexion therewith respectively. The regulations now in force were made in 1915; they correspond, however, to those of the 3rd November, 1883, set out in Moonoy's Compendium of the Irish Poor Law, at p. 455, et seq. Art. 20 of the regulations prescribes the qualifications necessary for a medical officer. The only requirement as to age is that he must be twenty-one. His duties are defined by art. 21.

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The plain object of the Poor Relief (Ireland) Act, 1851, is the efficient medical relief of the sick poor: per Palles C.B. in *R. (Keelan and Carragher) v. Local Government Board*, at p. 83(1). It is submitted that this is the sole consideration which should guide the discretion of the Local Government Board in approving or disapproving of the appointment of a medical officer for any particular district; and that it is not competent for the Local Government Board to have regard to considerations extraneous to and having no connexion with the objects of the Poor Relief Acts. In effect, they are endeavouring to make military age and eligibility a general disqualification for all appointments to medical officerships in Ireland. Their view is that imperial necessity requires for the time being the imposition of this disqualification; but imperial necessity, like public policy in general, cannot be ascertained except from the language of the Legislature. In *Hardy v. Fothergill* (2) Lord Selborne said, at p. 358:—"It is not, I conceive, for your Lordships or for any other Court to decide such a question as this under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the Legislature in the statute or statutes upon which the question depends." Military conscription has not been applied to Ireland, and there is no

(1) 5 N. I. J. R. 81.

(2) 13 A. C. 351.

K. B. Div. 1917. legislation extending to Ireland from which it is possible, as we submit, to infer any intention on the part of Parliament to subordinate the medical relief of the sick poor in this country to any of the exigencies, great as they are, of the present war. We submit that the reasons given by the Local Government Board are examinable, and show that the Local Government Board have not been guided by the paramount consideration of the medical needs of the sick poor in this district; the topics which have weighed with them to the practical exclusion of all others are those stated by them. It is submitted that in these circumstances the Local Government Board cannot be said to have exercised the discretion given to them. In *The Queen v. Vestry of St. Pancras* (1) a vestry had a discretion to grant or refuse a superannuation allowance to a retiring officer. In declining to grant such an allowance they were influenced by the idea that they had no discretion as to its amount. The Court of Appeal, affirming the Queen's Bench Division, held that the vestry had not properly exercised their discretion, and Lord Esher M.R. said, at p. 375, "[The vestry] must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion." [He also cited *The King v. The Archbishop of Canterbury* (2); *R. (Downpatrick Union) v. Local Government Board* (3).]

Wylie K.C. (with him *Wood*), for the respondents:—

In this case there has been no refusal to exercise a discretion, and unless there is something which amounts to a refusal to exercise a discretion no mandamus will lie. The extent of the discretion vested in the Local Government Board by sect. 8 of the Poor Relief (Ireland) Act, 1851, is far wider in its subject-matter than the benefit of the sick poor; it is not limited to their relief. Even assuming that the Board's discretion is so confined,

(1) 24 Q. B. D. 371.

(2) 15 East, 117, at pp. 136, 140.

(3) 2 N. I. J. R. 77.

they have not strayed outside its scope. Under sect. 8 the Board have power—1, to approve of appointments; 2, to determine the necessary qualifications for medical officers. Approval is something outside and opposed to qualifications. In *The Queen v. The Local Government Board* (1) there was no unfitness in Dr. Dillon to look after the sick poor. Here the Local Government Board have considered the medical necessities of the district. They have laid down no general rule about the appointment of men of military age. In the adjoining dispensary district they have sanctioned the appointment of a man of military age.

As to the exercise of a discretion, in *The King v. The Bishop of Gloucester* (2) Parke J. said, at p. 163, "There is no mode of forcing a person who has a discretionary power to exercise his discretion in a particular manner." That is what the prosecutors here are attempting to do. Once the discretion has been exercised the Court will not interfere: *The King v. The Justices of Kent* (3); *The King v. The Archbishop of Canterbury* (4); *The King v. The Poor Law Commissioners (Re Newport Union)* (5); *The Queen v. Governors of Darlington School* (6).

Carrigan K.C., in reply:—

The discretion to be exercised by the Local Government Board is one to be exercised by them for the benefit of the sick poor, and not for the benefit of the Empire at large. *Cassel v. Inglis* (7) contains a catalogue of discretion cases. The Local Government Board are not bound to give any reason for their decision, but if they do such decision can be challenged in a Court of law. Certain qualifications for medical officerships have been stereotyped by the Board themselves (see their regulations of 1915), and they cannot change those qualifications except by sealed order. This refusal is part of the general policy of the Board. They are a quasi-judicial body, and have allowed their discretion to be influenced by extraneous considerations: *R. v. Brighton Corporation; Ex parte Tilling, Limited* (8).

Cur. adv. vult.

(1) 14 L. R. Ir. 186.

(2) 2 B. & Ad. 158.

(3) 14 East, 395, at p. 400.

(4) 15 East, 117.

(5) 6 A. & E. 54.

(6) 6 Q. B. 682.

(7) [1916] 2 Ch. 211.

(8) 85 L. J. K. B. 1552.

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K. B. Div. SIR JAMES CAMPBELL C.J., having stated the facts as above,
 1917. continued as follows:—

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The issue having been in this way knit, the guardians applied for and obtained on the 3rd July of this year a conditional order for a mandamus directed to the Local Government Board, requiring them to exercise, according to law, their discretionary power to approve or disapprove of the appointment of Dr. Cronin. The affidavit of the clerk of the board of guardians filed in support of this application relates the facts as I have stated them, and refers to the fact that Dr. Dwyer is himself of military age; and that the guardians, in view of the size and character of his own district of Ballyduff, were of opinion that it would be impossible for Dr. Dwyer to discharge the duties of both dispensaries; and, further, that it was not possible to obtain any doctor over military age to fill Dr. Kenny's vacancy. The Local Government Board, by way of cause, have filed a short affidavit by their secretary, in which he states that the facts are correctly stated in the clerk's affidavit.

Notice was then served on behalf of the guardians to have the conditional order made absolute, and counsel on their behalf, in support of the application, rested their case upon two grounds—First, that the Local Government Board, in the exercise of their discretion to approve or disapprove of Dr. Cronin's appointment, could not legally have regard to or consider any matter save and except the proper provision of medical relief for the sick poor of the dispensary district; and that in this case their discretion had been exercised, having regard to an extraneous matter, namely, the urgent demand by the military authorities for the services of medical practitioners in the R.A.M.C. Second, that in any event it was not possible, due regard being had to the necessary provision for the medical relief of the sick poor of the Tallow dispensary district, to fill up the vacancy otherwise than by the appointment of a separate practitioner of military age.

As to the second point, the applicants have wholly failed to establish that any such impossibility exists, and in any event I am convinced that this is a matter to be determined, not by this Court, but by the Local Government Board in the exercise of their

discretion. In their letter of 1st March, 1917, to the guardians, the Board allege that the guardians are in a position to provide for the medical care of the sick poor of the Tallow district by continuing the employment of Dr. Dwyer. The guardians reply to this by stating that they consider it would be physically impossible for Dr. Dwyer to discharge the duties of the two districts; and in the affidavit of their clerk the same belief on their part is repeated in these words:—"The guardians were of opinion that it would be impossible for Dr. Dwyer to discharge the duties of both dispensaries," and their reasons for this opinion are then stated. Mr. Gibson K.C. has contended that the secretary of the Local Government Board, by the statement in his affidavit, that the affidavit of the clerk of the guardians, in so far as it purports to state facts, is correct, has admitted on behalf of his Board that the opinion formed by the guardians upon a consideration of these facts is also correct. It is not open to us, in our opinion, to place any such interpretation upon the affidavit of Mr. Barlas in view of the declared opinion of the Local Government Board in their letter to the guardians of 1st March, 1917, that the guardians were in a position to provide for the medical relief of the sick poor of the Tallow district by continuing the employment of Dr. Dwyer. The guardians themselves had previously placed the same gentleman in charge of both districts from November, 1916, to February, 1917; and there was no evidence of any kind before us to suggest that he had been unable during that period adequately to discharge the duties of the enlarged area, or that he was unwilling to continue to discharge them for the duration of the war. Further, it is quite possible, so far as appears from anything in evidence before the Court, that the needs of the situation might be met in other ways, as, for example, by the redistribution of the existing districts or by the holding of a fresh election, when, as the Local Government Board may well believe, longer and more general advertisement of the vacancy might secure a suitable applicant, holding some other post in the locality, who was over military age. We asked to see the advertisements that were issued in this case, and the sole response was the production of a single newspaper, the *Cork Examiner* of 10th February, 1917, published four days from the date of the election, although in general

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K. B. Div. practice ten days' previous notice is given. Again, it may well be
 1917. that if and when the matter is put to the test of a fresh election,
 R. or even without requiring this further test, the Local Government
 (LISMORE GUARDIANS) Board may in the exercise of their discretion come to the conclusion
 L. G. B. that it is not possible to deal with the situation otherwise than by
 the appointment of a medical officer, even though of military age;
 Sir James and Mr. Wylie K.C. has, upon their behalf, given us the assurance
 Campbell C.J. that the matter would be carefully inquired into and impartially
 determined by them upon its merits. It is enough to say upon
 this part of the case that I am clearly of opinion that this Court is
 not entitled to hold that the important consideration of the
 medical relief of the sick poor of the Tallow district has been for one
 moment lost sight of or disregarded by the Local Government
 Board.

In the case of *R. (Keelan and Carraher) v. Local Government Board* (1) the only one of the authorities cited before us which seems to have any direct bearing upon the questions for decision, it was sought to challenge by certiorari an Order of the Local Government Board amalgamating or altering certain existing dispensary districts. The report does not contain any clear summary of the facts, but they can be sufficiently collected from the judgment. It appeared that the guardians of the union had appointed to a vacancy in the post of medical officer of one of the districts a young and newly qualified practitioner at the salary of £150, an increase of £30 over the previous salary, but the Local Government Board declined to approve of the appointment, giving as their reason the discontent that would be aroused amongst the other medical dispensary officers in Ireland, if they sanctioned the appointment of a young and newly qualified practitioner at an initial salary so largely in excess of the average. The guardians being subsequently unable to procure a suitable applicant for the vacancy at the salary of £120, the Local Government Board as their solution of the difficulty proceeded to make an order extinguishing the district in question and sub-dividing it amongst other adjoining districts. The medical officers of these adjoining districts joined in an application to this Court to quash the order, upon the ground that the duties of the districts as altered would occupy their entire

time to the destruction of their private practice, and also upon the ground that the Order for the extinction of the particular district and its sub-division amongst adjoining districts was not made upon consideration of the medical needs of the sick poor of these several districts, but had its origin in the declared policy of the Local Government Board, to avoid the danger of discontent amongst the medical dispensary officers of the country, consequent upon the approval by the Board of the appointment of a newly qualified practitioner at an initial salary of £150, it being contended that in acting upon any such policy the Local Government Board had taken into consideration a matter extraneous to their jurisdiction. Pallett C.B., in delivering the judgment of the Court, held that as to the first contention the amalgamation of districts was solely and absolutely within the control and jurisdiction of the Local Government Board, and therefore a matter in which this Court could not interfere, and he further held that in withholding their approval of the appointment in question they were entitled to take into their consideration the alleged extraneous matter, provided they had always in the forefront the provision of sufficient medical relief for the sick poor. The decision upon this second point will be referred to later on, in its application to the first and principal question that has been argued before us. I am now only citing it as a direct authority for the proposition that all questions relating to the amalgamation, alteration, or definition of dispensary districts are plainly entrusted by statute to the Local Government Board for determination in their discretion.

The remaining question in the case is one of great importance, and, as was admitted by counsel upon both sides, is the real question upon which the parties are anxious for the decision of this Court, namely, whether the Local Government Board, in exercising their discretion to approve or disapprove of an appointment, are entitled to have regard to any considerations other than those directly relating to or affecting the provision of medical relief for the sick poor? We have been referred to several sections of the Poor Relief (Ireland) Act, 1851 (14 & 15 Vict. c. 68), and to a printed copy of the Regulations made under the provisions of sect. 12 of that Act, but sect. 8 of the Poor Relief (Ireland) Act, 1851 (14 & 15 Vict. c. 68), seems alone to be

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K. B. Div. material. The relevant portion of that section is contained in
 1917. these words, "The committee of management shall appoint, from
R. time to time, subject to the approval of the said commissioners
 (LISMORE GUARDIANS) [now the Local Government Board], one or more medical officers
v. for the said district, with such qualifications as the said commis-
 L. G. B. sioners shall determine, and with such salaries as the guardians,
 Sir James subject to the approval of the said commissioners, shall deter-
 Campbell C.J. mine; . . . And it shall be lawful for the said commissioners
 to remove any such medical officer on sufficient grounds."

It was conceded by the applicants that if the Local Government Board, in the exercise of the power of approval thereby conferred upon the commissioners, had, in this particular case, confined themselves to a simple declaration that, after consideration of all the circumstances, they had determined, in the exercise of their discretion, not to approve of the appointment, their decision could not be questioned by this Court; but they contended that, in any case in which the Local Government Board themselves supply and state the reasons for their decision, it is open to this Court to review and, if necessary, overrule the exercise by them of their discretion if, in the opinion of the Court, they have had regard to extraneous matters not necessarily connected with medical relief of the sick poor. Accordingly, it was contended that from the documents in evidence in this case, it is apparent that the respondents, in refusing to sanction the appointment of Dr. Cronin, did so in accordance with their declared and settled policy not to sanction any appointment of a medical practitioner of military age, in view of the urgent demand by the military authorities for the services of all such practitioners.

We cannot find any evidence of the existence of such a policy as a matter of universal application. On the contrary, the circular of the 22nd September, 1916, issued by the Local Government Board, distinctly states that it is only to be applied in cases where it is possible by reason of other suitable and satisfactory arrangements being possible; and the particular case before us conclusively negatives the suggestion of a policy of universal application, because it appears upon the documents that the appointment of Dr. Dwyer, made in April, 1916, by the present applicants themselves, to be medical officer of the Ballyduff Dispensary District

during the duration of the war, received the formal approval of the Local Government Board, notwithstanding the fact that he was of military age, and, in declining to approve the appointment of Dr. Cronin, they are careful to point out that, in their opinion, another suitable arrangement is possible.

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The question for decision in this case is, therefore, narrowed down to this, was it open to the Local Government Board, in the exercise of their discretion, to require that in view of national and military exigencies the appointment of medical officers during the war should be confined to practitioners over military age in cases where other suitable and satisfactory arrangements could be made? For myself I am satisfied, and so, I believe, are the other members of the Court, that, so long as they have due regard to suitable provision for the medical relief of the sick poor, it is open to this great Department of the State, presided over by the Chief Secretary for Ireland, and dealing with appointments which are paid for, in part at least, out of Imperial funds, to refuse, in these days of the Nation's unprecedented strain and superhuman effort, to encourage by premium or inducement medical practitioners of military age to seek for civil employment. We are confronted with a condition of things without a parallel in the history of our nation, which not only has revolutionized our outlook, but has compelled readjustment in every department of public life—in our trade, our commerce, our industries, and even in the supply of our daily food; and is it conceivable that under such conditions the Local Government Board alone must stand aloof, or that it was not their duty as well as right to lend a hand by endeavouring, as far as possible, in this national crisis, to marshal the medical assets of the country.

The patriotic action of hundreds of the medical profession in Ireland in volunteering for service in the war has denuded many of the hospitals and charitable institutions of this country of their regular medical staff, whose places have got to be filled, and call for the services of young and active men. Even if we regard the situation from this purely domestic point of view, is it possible for us to pronounce a judicial condemnation of the action of the Local Government Board in an effort in the honest exercise of their discretion to ease the situation by providing for the economic

K. B. Div. distribution or "rationing" of the limited and decreasing supply
 1917. of medical practitioners with a view to satisfy so far as possible
 R. the pressing needs of the military service, without at the same
 (LISMORE time impeding or interfering with suitable and satisfactory arrange-
 GUARDIANS) ments for the medical relief of the sick poor? Mr. Wylie K.C., in
 v. L. G. B. his very clear and concise argument, has pointed out that the
 Sir James power of approval in sect. 8 of the Poor Relief (Ireland) Act, 1851,
 Campbell C.J. must be subject to considerations other than and wholly apart
 from the professional fitness of the person appointed, because it is
 only after the selection of a candidate possessing the prescribed
 qualifications that the power to approve or disapprove can be
 exercised. He has further emphasized the important consideration
 that while in the same section the power to dismiss can only be
 exercised on sufficient grounds, the power of approval is unqualified
 and unlimited. Assuming but not deciding that the Local Govern-
 ment Board, in their exercise of this discretion, are performing a
 judicial and not an administrative act, we hold that they cannot
 be controlled by this Court unless we are satisfied that they had
 taken into consideration matters so fantastic or so foreign to the
 subject-matter as to be equivalent to a failure to exercise any dis-
 cretion at all, or that they had disregarded the provision of suitable
 and satisfactory arrangements for the medical needs of the sick
 poor. If we apply this test to the facts of this particular case it
 seems to be perfectly impossible to arrive at either of these con-
 clusions. At the outset the applicants were confronted with the
 fact that in compliance with the suggestion contained in the circular
 letter of 26th November, 1915, issued by the Local Government
 Board, they had themselves, in the case of all vacancies for dis-
 pensary medical officers arising since the outbreak of the war, not
 only limited the appointment to the duration of the war, but also
 undertaken that if the person so appointed should subsequently
 offer his services to the military authorities they would not hold
 him to his appointment, and would afford him every facility to
 do so. Counsel for the applicants, being alive to this difficulty,
 were at first inclined to argue that all such temporary appoint-
 ments were ultra vires, but being met by the Court with the
 obvious answer that any such proposition was necessarily fatal to
 their application, inasmuch as this Court could never by mandamus

direct the Local Government Board to approve of an appointment which was ultra vires on the part of the guardians who made it, this particular contention was dropped, and Mr. Carrigan K.C., in his reply, stated that the guardians did not question in any way the propriety or legality of the policy suggested by this particular circular. It is common knowledge that a similar policy has been adopted by all the Departments of the State as well as by many public bodies and important commercial and industrial companies and firms throughout the United Kingdom as a reasonable and necessary safeguard of the interests of those members of the staff who had placed themselves at the disposal of the nation for the duration of the war. The difference between such a policy and that outlined by the second circular of 22nd September, 1916, and applied by the Local Government Board in the present case is not one of principle, but at most only of degree; and once it was admitted by counsel for the guardians that they could not and did not challenge the jurisdiction of the Local Government Board in their efforts thus to safeguard the interests of all medical dispensary officers who volunteered, the whole foundation of their case disappears. In neither case could it be truly said that any such policy was in necessary conflict with the provision of medical relief for the sick poor of the particular district, but if in the one case the Local Government Board were entitled to protect the interests of medical officers who volunteered for military service during the war, it is impossible to contend that they were not equally entitled, due regard being likewise had to proper provision for the sick poor, to consider a matter of transcendent, because of national, importance, namely, the necessity in a time of unprecedented emergency, for the economic distribution of the available medical man power of Ireland.

We further hold, in accordance with the principle of the decision of *Keelan's Case* (1), that once this Court is satisfied that in the particular case the Local Government Board, in the exercise of their discretion, have paid due regard to the predominant consideration we cannot question or criticize that action merely because they have taken other considerations into account, which however important in themselves have no direct bearing upon the provision of medical

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(1) 5 N. I. J. R. 81.

K. B. Div. relief for the sick poor. I put the case to counsel for the guardians,
 1917. in the course of the argument, of the sudden outbreak of a plague
 R. which was devastating the whole of England and Scotland, or
 (LISMORE GUARDIANS) even the whole of some one of the four provinces of Ireland, and
 v. I asked if in such an emergency it would be open to the Local
 L. G. B. Government Board to make arrangements so far as possible
 Sir James whereby the younger and more active members of the medical
 Campbell C.J. profession in this country should be made available to cope with
 the outbreak, and I was unable to elicit any satisfactory reply.
 Though it is obvious that even such an emergency as I have
 hereby assumed sinks into insignificance in comparison with the
 needs of the existing situation.

Further, it is indisputably plain, even upon the most casual
 perusal of the two circulars that have been impugned in this case,
 that the Local Government Board took into consideration the
 manifest fairness towards the members of the medical profession
 in Ireland of military age who volunteered for service in the war,
 of a policy which, so far as possible consistently with adequate pro-
 vision for the sick poor, would preserve to them their legitimate
 chances after the war, in competition for the position of medical
 dispensary officer, and the probable discontent which the failure
 to supply such provision would arouse. Upon that assumption, I
 fail to see the slightest difference in principle between the matters
 taken into consideration by them in the present case and those
 considered in *Keelan's Case* (1), with which I have already fully
 dealt, in its application to the other branch of this case.

We have been asked to infer that the Local Government
 Board, in enforcing this policy, were solely actuated by the
 indirect motive of enforcing the conscription of the medical pro-
 fession in Ireland. A similar suggestion was put forward in the
 affidavits in *Keelan's Case* (1), which charged the Local Govern-
 ment Board with having made the alteration in the dispensary
 districts, not in the interests of the sick poor, but solely for the
 indirect purpose and policy of cutting down salaries. The Court
 in that case declared the suggestion to be without foundation;
 and though it had not been relied upon by counsel for the appli-
 cants, Palles C.B. bases upon it the order of the Court condemning
 the applicants in costs.

We also must decline to entertain any such suggestion, being of opinion that it has no foundation upon any documents or facts in evidence before us. To attempt to enforce conscription is one thing, but to encourage the performance of a patriotic duty by withholding a premium or inducement to seek for civil employment is another and wholly different matter. Many public departments, many public and private employers, have suspended or delayed promotion for the duration of the war, and kept open their positions for those of their staff who are employed in military or naval service for that period, and private employers have in many cases in selecting their servants given a preference to men over the military age. Many instances of the same kind could be mentioned, in all of which it would be equally ludicrous to suggest that the parties concerned were influenced by the indirect motive of enforcing conscription. While we are deciding this case upon the assumption that the power conferred upon the Local Government Board required the exercise of a judicial discretion, we can see many weighty considerations in support of the contention that it is an act essentially of administration only. This question has not been referred to or discussed in the argument before us, but upon the assumption that the act which it is sought to challenge by mandamus in this present case is one of administration only, we should be compelled to hold, as we did recently in the case of the Howth Township, *R. (N. Dublin Rural Council) v. Local Government Board* (1), that the remedy by certiorari or mandamus has no application, and consequently that we had no jurisdiction to interfere. It is a question which may hereafter arise for argument and decision, as, speaking for myself, I hold it to be the duty of an important department of the State, such as the Local Government Board, to vindicate the jurisdiction conferred upon it by Parliament; otherwise it would be shifting from its own shoulders to this Court a responsibility to consider and determine questions of administration which the Legislature in its wisdom has entrusted for solution to the department itself, and not to us.

In deciding this case we are acting upon the assumption acquiesced in by both sides: that the discretion to be exercised involved a judicial determination in the legal sense of the word

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(1) 2
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(1) [1917] 2 I. R. 454, and see post, p. 158.

K. B. Div. "judicial," and that we are, therefore, entitled to examine into the
 1917. reasons supplied for its exercise. In that view we are of opinion,
R. and so decide, first, that there is no evidence before us from which
 (LISMORE GUARDIANS) we can legitimately draw the inference that the Local Government
v. Board have in any respect failed to have regard to the provision
 L. G. B. of suitable and satisfactory medical relief for the sick poor of the
 Sir James Tallow district; and, second, that there is nothing savouring
 Campbell C.J. either of illegality or excess of jurisdiction in any of the other
 matters which they have taken into their consideration in this
 particular case. Accordingly, we decide that the application has
 failed both in law and upon the merits, and must be refused.

GIBSON J.:—

There are two questions for decision. The first, of immense importance, is whether the Local Government Board in refusing to approve of Dr. Cronin acted on matters outside their jurisdiction: *Reg. v. Cotham* (1); the second is whether, on the evidence, the Board are shown to have disregarded the interests of the sick poor in such a way that they may be deemed to have exceeded jurisdiction, or to have declined to exercise jurisdiction. There may be a third possible question (not dealt with by counsel), whether the Board, who are required to report to Parliament, and who have the Chief Secretary as their official head, are subject to mandamus in respect of a refusal to approve, relating to such an official as a dispensary doctor.

The evidence has been summarized by my Lord. I need not restate it. It is to be regretted that the reasons of the Board must be collected from letters expressed in somewhat inaccurate language. It is, however, clear that they have adopted the general principle that, where other arrangements are possible, doctors of military age should not during the war be appointed temporarily as well as permanently. If they had jurisdiction, and there were matters on which their discretion could properly be exercised, this Court cannot substitute its view for theirs, and overrule them by mandamus.

(1) [1898] 1 Q. B., at p. 806.

On the first, the broad question, the argument of applicants' counsel was threefold.

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1. The function of the Local Government Board in giving or withholding approval is confined to considerations affecting the fitness of the qualified doctor to discharge the duties of the particular district to which he has been appointed.

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2. If their function is of wider reach, and enables them to entertain considerations affecting Ireland at large, it has been exceeded in this case, where matters outside our territory have influenced the Board.

3. Taking the principle as intended to be, where practicable, of general application, it should have been embodied in an official regulation.

I shall discuss the first two points together. Though there have been many statutes requiring the approval of a Secretary of State or of a public department to the doing of an act, or the making of an appointment, I am not aware of any instance where refusal was challenged on mandamus. No ground of refusal need be stated, nor can the Court compel it to be disclosed. Where it is stated I shall assume that the Court can decide whether the refusal to approve is, on such ground, within legal competence. It is clear that any objection seriously affecting conduct or character, notwithstanding medical fitness, as in *Dr. Dillon's Case* (*R. v. Local Government Board*) (1) (a case of certiorari as to removal), justifies rejection. Here there is nothing of the kind. Dr. Cronin is rejected not because he is unqualified or unfit, but because he is peculiarly fitted for service elsewhere. Can the war and its distressing effects be considered at all by the Board when called on to approve or consent? Where land is proposed to be bought with their approval, as for local libraries, or money is to be borrowed by a local authority, I have no doubt that though in the piping time of peace consent would be obtained without difficulty, in existing conditions the Board might legitimately decline the application.

Financial stringency is, however, not quite the same as dearth of doctors. Are the Board at liberty to travel beyond the particular dispensary district, and take a wider view of the needs of

(1) 14 L. R. Ir. 186.

K. B. Div. the country as a whole? The medical dearth is a patent fact,
 1917. and is the text of the President's address to the General Medical
 R. Council, reported in *The Times*, 28th November, 1917. Where
 (LISMORE there is a general deficiency of doctors, some system of distribu-
 GUARDIANS) tion, a kind of rationing, must be adopted in the interest of the
 v. L. G. B. entire community, to meet the requirements of our civil and
 Gibson J. military hospitals and sick persons generally, subject to the
 statutory obligation to provide for the primary duty towards the
 sick poor. The Board do not exceed their powers if they look to
 the needs of the country at large, and do not confine their
 attention to the individual dispensary district, if its wants can be
 satisfied. They may also, I think, legitimately take into account
 the claims of our Irish troops, who, taken from their homes, will
 some day return, and many of whom, wounded or maimed, will
 for a long time require medical treatment. Between regiments,
 all containing men from different countries, it is impossible to
 draw any distinction. In any point of view the war is our war,
 and we are all members of one body. The Board are entitled
 to exercise their superintending authority, as a just and wise
 employer or manager would, in apportioning the medical supply,
 so far as it can be done without prejudice to the sick poor.
 Other considerations, founded on the desirability of securing
 equality of opportunity, and of preventing any just cause of
 complaint or grievance in the medical profession, support the
 same conclusion.

The unfairness of filling vacancies during the war, when those
 absent at the call of national and humane duty are removed from
 the possibility of competing, is obvious, and is recognized in the
 legal profession as well as in other branches. It is admitted by
 the action of the Lismore Guardians in advertising for a medical
 officer for the duration of the war. Dr. Cronin was appointed on
 that footing, whether the appointment is to be taken as subject to
 an undertaking by him to retire when the war ends or as strictly
 temporary. Mr. Carrigan at one part of his argument appeared
 to hint that such appointment was not authorized by the existing
 regulations; but as the mandamus is on the basis that the
 appointment was regular and must fail if it was not, he gave up
 the point. The Guardians also undertook that if Dr. Cronin during

the war took service with the Royal Army Medical Corps, they would not hold him to his appointment.

In limiting the duration of the appointment, the Guardians to some extent mitigated, but were far from removing, the grievance of the doctors who had gone away. The temporary incumbents enjoying a safe practice at home, would have been acquiring a kind of goodwill, and would not be easy to dislodge from their positions in which they would have taken root. Different Boards of Guardians might adopt contrary views, some thinking that preference of home service was rather meritorious than otherwise, while others might hotly advocate the contrary opinion. This painful controversy might affect individual dispensary districts where there might be strong supporters of the rival views. A mischievous atmosphere of acrimonious jealousy and strife might thus be generated in the great medical profession, injurious to public interest, which requires goodwill and cordial co-operation in that branch of national service. In *Keelan's Case* (1), at pp. 81 and 84, Palles C.B. adverted to this element of discontent and grievance in reference to the age of officers as relevant for the consideration of the Local Government Board. No doubt, he was dealing with a different question, salary, in a district properly constituted under sect. 6 of 14 & 15 Vict. c. 68 (2); but his language is germane to the controversy before us. Like a trades union, the profession is prejudicially affected as a whole by a sense of grievance or by agitation.

After much consideration, I have formed the conclusion that the principle adopted by the Board of postponing in this unexpected emergency, where practicable, young to middle-aged men is not by implication excluded by the Poor Law Code. The principle is not arbitrary or unreasonable; it secures uniformity of administrative action, avoids heart-burning or ill-feeling between members of the profession, and possibly in districts as well, and provides for a fair distribution of our depleted medical supplies. Though the Legislature in 1851, in 1872, and 1898 did not contemplate such a crisis as has befallen the nation, the word "approval" is without limitation, and lets in all considerations which from time to time reasonably affect discretion. If war

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K. B. Div. depletion and the need of apportionment of medical service may
 1917. lawfully influence discretion, we cannot review the decision of the
 R. Board, or the weight they attributed to the shortage and the method
 (LISMORE of dealing with it. The responsibility is theirs, not ours. If they
 GUARDIANS) are acting within jurisdiction, the error is not one which this
 v. Court can investigate or correct. The Board are placed in a
 L. G. B. position of unexampled difficulty, no solution of which would
 Gibson J. escape objection or cavil. They have adopted an intermediate
 course. While not depriving doctors staying at home of their
 advantage if their appointment is found to be necessary, they do
 not give a premium to them from the disappearance of others
 who cannot compete, and who in the future would find themselves
 handicapped by valuable posts having been filled.

The next point, that the principle or policy should have been put into an official regulation, is founded on a misconception. The principle is elastic, varying in application with circumstances; it is not a cast-iron rule. Had the Board prescribed that during the war no one of military age should be deemed qualified for appointment, such rule, in many cases unjust and injurious in application, might have been obnoxious to legal attack. On the other hand, a regulation that where reasonably practicable only men over military age should be deemed qualified would really not be a regulation at all; it would state only a principle of discretion governed by varying conditions. The Board indicate the general lines of procedure, but have abstained from a disqualifying regulation which might be misunderstood.

The second ground on which the mandamus is based is that the Board disregarded the interests of the sick poor; when Dr. Dwyer ceased to act, the appointment of a successor was urgent; no one over military age offered or was available; the suggestion that Dr. Dwyer should continue to undertake the two districts of the area and character described was inadmissible, it being impossible efficiently to attend to such districts in combination; and Dr. Dwyer had never applied for or accepted any such extension of duty. Mr. Wylie's answer to this was that the Board's letters were only "a suggestion," an expression found in the circular of September 22nd, 1916; that their refusal was not final but conditional and deliberative; that if no other arrangement

was found practicable, they would reconsider the matter. Meantime it is satisfactory that Dr. Cronin is allowed to attend to the poor and draw his salary without surcharge pending our decision. This aspect of the case presents some difficulty. It is not so important as the broad question already discussed, and depends on special facts as to which the decision of the Board may be altered, or which, on further investigation later on, might justify their view that a doctor over military age might be procured. What advertisements were inserted was not proved. The only one brought before the Court was one in the *Cork Examiner* a few days before the election—quite outside Article 12.

If the principle that those above military age should be appointed where reasonably practicable was within their jurisdiction and the Board considered that such men might by reasonable effort be got to offer their services, I do not think that their conclusion on that question of fact could be set aside as illusory, even though we might not agree with it, or that it would be such a failure to exercise jurisdiction as to invite and support mandamus, which is inapplicable to correct action within jurisdiction. The situation is, however, somewhat complicated by the letter of March 1st, 1917, proposing that Dr. Dwyer, who, during Dr. Kenny's illness, had attended to both districts, should be continued in the same way. Dr. Dwyer had not then nor has he since expressed his willingness to do so. Had the Board, he being willing, insisted on his appointment, it might be urged that this entailed a reduction of the medical service to which the poor of the district were entitled. Whether this should be deemed an error within jurisdiction or an error fatal to jurisdiction need not now be decided. The guardians being convinced that Dr. Dwyer could not efficiently discharge the double duty, did not apply to him nor did the Board. The matter stood in this unsatisfactory position when the conditional order was granted. The care of the poor demanded prompt attention. It is said by Mr. Wylie that the letter as to Dr. Dwyer was a mere suggestion to the Guardians which, not having been followed up, was dropped, the Board remaining unsatisfied that Dr. Cronin was the only available doctor. So read, the correspondence would not justify mandamus. The Board did not finally and formally found their refusal to approve on the

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 1917. the duties of the two districts. The matter did not arrive at that
 R. stage, and the proposal as to Dr. Dwyer was only one of other
 (LISMORE possible solutions; it was a suggestion which the Guardians may
 GUARDIANS) have rightly rejected, but it did not finally dispose of the problem
 v. or exhaust the jurisdiction of the Board. That body may have
 L. G. B. been wrong in suggesting Dr. Dwyer or in the view they took,
 Gibson J. that some doctor over military age could be obtained; but their
 conduct cannot be regarded as a definitive declining of jurisdiction.
 If they had jurisdiction to apply the principle of preference they
 state, though they may have applied it mistakenly in this case,
 their error cannot be examined on mandamus by this Court, which
 has no appellate functions. Some of the many cases on the subject
 are cited in *R. (Martin) v. Mahony* (1) and in *R. (Clonmel Asylum
 Committee) v. Considine* (2).

My decision proceeds on the basis adopted by counsel, that approval or disapproval was of such judicial character that if disapproval was found to rest on grounds beyond the competence of the Board to entertain, that department might properly be ordered to hear and determine, their rejection being treated as a declining of the exercise of jurisdiction. The absence of any example of such mandamus hitherto has suggested to the Court, as a matter worthy of consideration, whether refusal or approval may not be an administrative act, subject to parliamentary but not to judicial control; if it was such act, the present application would be untenable. The Board are not required by the Poor Law Code, in the Act of 1838 (3), sects. 31 and 33, or the Act of 1851 (4), sect. 8, to state their reasons, and cannot be compelled to do so. The right to remove on sufficient grounds may be more circumscribed, though it may be that the sufficiency of the grounds (which they are not directed to disclose) may be left to their decision, and is not to be determined by the Court as a tribunal of review. No similar limitation (as to grounds) is applied to the primary appointment. Refusal, no doubt, affects the personal interests of the individual doctor and the appointing

(1) [1910] 2 I. R. 695, at p. 741.

(2) [1917] 2 I. R. 1.

(3) Poor Relief (Ireland) Act,

1838 (1 & 2 Vict. c. 56).

(4) Poor Relief (Ireland) Act,

1851 (14 & 15 Vict. c. 68).

body; but administrative acts involve consideration of reasons for and against, and frequently affect direct interests. A recent example is the *Howth Case*, *R. (N. Dublin Rural Council) v. Local Government Board* (1).

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The constitution, redistribution, or amalgamation of dispensary districts under sect. 6 of the statute of 1851, in bona fide exercise of statutory powers, would be an administrative act *intra vires*: *Keelan's Case* (2), though it would affect both doctors and districts much more than the rejection or postponement of an individual medical man like Dr. Cronin. The point is important, as there are many officials of different tenures for whose appointment approval is required. I indicate no opinion on it, or how far my judgment, based on special considerations affecting a particular professional class, would govern the case of such other officers. Such questions must be left to future decision.

KENNY J. :—

I concur in the conclusion that the conditional order ought to be discharged.

The circumstance that has weighed most strongly with me throughout the argument in this case has been that the action of the Local Government Board would seem to have been dictated solely and simply by a regard for the admitted necessities of the country in the struggle for national existence through which it is passing. It cannot be, and has not been, asserted that the Board has acted in any high-handed way, or other than in a manner in which a prudent department would act having regard to Imperial calls. No doubt the care of the sick poor is the paramount consideration to which the Act of 1851 was directed, but, at a time like the present when great sacrifices are being made by the nation and great suffering endured by many classes of the people, even that consideration must, to some extent,—though I hope to a very limited and temporary extent,—yield to the claims born of the national exigency. Throughout the correspondence in the case it seems to me that the Local Government Board have anxiously kept before their eyes the needs of the sick poor, and

(1) [1917] 2 I. R. 454 (affirmed post, p. 158). (2) 5 N. I. J. R. 81.

K. B. Dw. have fully recognized their responsibilities and those of the
 1917. Lismore Guardians, while at the same time realizing the serious
 R. demands of the medical staff of the army. From this conflict of
 (LISMORE GUARDIANS) claims the broad question emerges—namely, whether the Local
 v. Government Board can justify their refusal to approve of Dr.
 E. G. B. Cronin's appointment on the ground that he is a medical gentle-
 Kenny J. man of military age whose services could be placed at the disposal
 of his country in its present urgent need. That is the broad
 question of substance we are asked to decide, and which is regarded,
 as I understand, by the Local Government Board as that on
 which they are anxious to obtain a decision, and in my opinion
 we should not allow other points that have been argued in the
 case to obscure the importance of this question, or induce us to
 reply on any topic of a character which would divert the Court
 from the main issue. Arguments have been adduced for the
 disallowance of the conditional order on the ground that it
 purports to command the performance of an obligation by the
 Local Government Board which the latter say they have already
 fulfilled—namely, the exercise of its discretionary power of
 approval or disapproval, and on the ground that the discretion
 exercised by the Board has been so exercised on a complete review
 of all the facts and is final and absolute and that the ground of
 the exercise of their discretion is not examinable. I do not propose
 to advert to these matters further than to say that I think we
 ought to treat the main question as not affected by the wording of
 the conditional order, even if there was a doubt about its form, and
 that we should assume that the alleged grounds for the exercise
 of the discretion are examinable.

The language of the eighth section of the Poor Relief (Ireland) Act, 1851, is distinct in giving to the Poor Law Commissioners—now the Local Government Board—an absolute and uncontrolled discretion in the approval or disapproval of the appointment of the medical officer. And if the Local Government Board had refrained from giving any grounds for their decision, and had simply stated that having given every consideration to the minutes of the Guardians and the peculiar circumstances of the case, they withheld their approval, they would admittedly have been well within their rights; and their decision, fairly and honestly arrived

at could not have successfully been challenged. To have refused a statement of their reasons might have appeared autocratic and discourteous, but it would not have been illegal, and I think the course adopted, of frankly giving the grounds for non-approval, and thereby inviting criticism, is one that is not open to censure. The Board have admittedly taken into consideration what has been described as an extraneous subject, namely, the exigencies and requirements of the Empire as a whole; and the question is whether they were justified in allowing such a topic to influence their decision. In the opinion I have formed on this question I need go no further than to say that it seems to me that not only were the Board justified, but they were bound, to consider carefully that topic and to attach the very greatest weight to the demands of the present exceptional national emergency. I think that the Local Government Board, having regard to the impregnable position they might have taken up,—having regard to their uncontrolled statutory power, have throughout this matter acted reasonably and justly. They have not, as I understand their attitude, finally closed the door on the appointment, in any circumstances, of a doctor eligible for military service, and it may be that with further developments the appointment of such a doctor might be sanctioned. But the Local Government Board are, I consider, bound to exhaust every available expedient for avoiding such a result, and, as has been thrown out by the other members of the Court, it may still be within the bounds of possibility by proper advertisements to obtain an application from a gentleman ineligible for military service. I do not consider that the Local Government Board have taken up an absolutely non possumus attitude, but, on the contrary, that they would be prepared to take into consideration all the circumstances of the case with an earnest desire to make full provision for the sick poor consistently with the calls of the Army Medical Service.

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Solicitors for the applicants: *E. A. Ryan & Co.*

Solicitor for the Local Government Board: *James Mecredy.*

G. E. H.

Appeal. THE KING (NORTH DUBLIN RURAL DISTRICT
1917. COUNCIL) v. LOCAL GOVERNMENT BOARD FOR
June 18, 19, IRELAND (1).
20.
July 31. *Town—Existence and extent of—Order of Local Government Board defining
boundaries—Certiorari inapplicable—Towns Improvement (Ireland) Act,
1854 (17 & 18 Vict. c. 103).*

A town sought to adopt the provisions of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103). The application was made by electors "within the boundaries, hereinafter specified, of the town or district of Howth or Sutton, in the County of Dublin." The population of Howth town was, according to the census returns, only 1357. The proposed boundaries included not only the town and the remainder of the townland of Howth, but also other townlands, comprising in all 2900 acres, with a population of 3267.

By sealed order, dated January 17th, 1917, the Local Government Board approved of the proposed boundaries, and a statutory meeting was held on February 17th, 1917, at which a resolution to adopt the Act was carried by a large majority. On March 22nd, 1917, the Local Government Board issued their sealed order approving of the adoption of the Act by the "town of Howth," bounded as in their order of January 17th, 1917.

On March 28th, 1917, the North Dublin Rural District Council obtained a conditional order of certiorari to quash the two sealed orders. The King's Bench Division discharged the conditional order of certiorari on the ground that the Local Government Board order finally approving of the adoption of the Act was made final and conclusive proof for all purposes by sect. 15 of the Act.

Held, by the Court of Appeal, Sir Ignatius J. O'Brien C. and Ronan L.J. (Molony L.J. dissenting), that the refusal of the King's Bench Division to grant a certiorari was right.

Per Sir Ignatius J. O'Brien C., on the ground that the householders of the town in sect. 4 are not necessarily the householders of some area that is popularly called a town, but are householders within the boundaries which have been marked out upon a map to be approved or disapproved of by the Local Government Board; and inasmuch as a determination of the question whether sect. 15 of the Act of 1854 took away certiorari was not necessary to the decision of the Court, he declined to express any opinion on this point.

Per Ronan L.J., that inasmuch as the order of the Local Government Board of March 22nd, 1917, could have had no operation until approved of under sect. 15, and, therefore, did not per se impose liability or alter rights, it was not subject to certiorari.

(1) Before SIR IGNATIUS J. O'BRIEN C. and RONAN and MOLONY L.JJ.

APPEAL from an order of the King's Bench Division discharging a conditional order obtained by the appellants, the prosecutors, for the purpose of quashing two sealed orders made by the Local Government Board for Ireland under the provisions of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103).

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In the month of July, 1916, the Local Government Board received a memorial asking for an order that the Towns Improvement Act, 1854, be applied and carried into execution within the boundaries specified in the application. The application was signed by 290 Local Government electors and householders within the area constituting the proposed township of Howth. This area comprised 2,900 acres, with a population of 3,267, whereas according to the last census returns the area of the entity described therein as the "town of Howth" was only thirty-five acres, with 1857 inhabitants.

By sealed order of January 17th, 1917, the Local Government Board signified their approval of the proposed boundaries, and at the statutory meeting subsequently held a resolution to adopt the Act within the proposed boundaries was carried by a large majority of the electors present.

On March 22nd, 1917, the Local Government Board issued their sealed order approving of the adoption of the Towns Improvement (Ireland) Act, 1854, by the "town of Howth," bounded as in their order of January 17th, 1917, directing the division of the township into wards, and the number of Commissioners to be elected.

The two orders made by the Local Government Board were impeached by the prosecutors, the North Dublin Rural District Council, upon the ground that a condition precedent had not been fulfilled, because no application had been made to the Local Government Board by twenty-one persons on the Local Government register for a town (as defined by sect. 1 of the Towns Improvement (Ireland) Act, 1854) with a population of not less than 1500 persons, as ascertained by the returns of the last preceding census.

The King's Bench Division discharged the conditional order for certiorari, and from this decision the prosecutors appealed.

Jellett K.C., and *Murnaghan*, for the appellants.

- Appeal.* *Wylie K.C.* (with him *Henry K.C.* and *Overend*) for the Local
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-
- R.*
(*N. DUBLIN* *Healy K.C.* (with him *E. Murphy*), for Local Government
R. D. C.) electors.
- v.*
L. G. B. The arguments were similar to those in the Court below (1).

SIR IGNATIUS J. O'BRIEN C.:—

The importance of this case lies in the fact that the Local Government Board, in administering the provisions of 17 & 18 Vict. c. 103, have, for many years, acted on a construction which, if found to be wrong, would have to be abandoned by them in the case of future applications for the creation of townships in Ireland, thereby causing, in my opinion, grave public inconvenience. Judges sometimes say that they are not influenced in arriving at their decisions by the consequences that may follow. That should be so, but I think only to a limited extent.

I should say that if the Act had been construed a short time after its passage, it might then have been held that it was never intended to apply to anything except communities contemplated by statute of Geo. 4, whose population could be ascertained in the census returns. But there has been recognition by the Courts of the practice of the Local Government Board during more than half a century, according to which a very much larger meaning has been given to the Act of 1854. Accordingly, I have to approach this case from the point of view that something which is not a town, by reference to the statute of George, was contemplated.

Where there are two possible constructions of an Act of Parliament, I am entitled to accept that which is in accordance with public convenience in preference to that which would have a contrary effect; and putting the appellants' case at its highest, the most that can be said for their argument is that the construction they support, although a possible one, is not one which commends itself to me.

Put broadly, the appellants' contention is based upon what, it is supposed, was decided by the King's Bench Division in 1878 in

The Queen (Dixon) v. The Local Government Board (1), namely, that you can never put the Act in force unless you can start with something which is called a town, and which has a population of over 1500 inhabitants; that if you start with this town you may enlarge its boundaries, or perhaps cut a bit out of it, and extend the boundaries of what is left; but, according to the argument, the existence of such an entity is an essential.

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The difficulty in the case is created by the definition of "town" in sect. 1 of the Towns Improvement Act, 1854. The word "town," as defined in the section, means and includes "a city, town corporate, borough, market town, or other town in Ireland, containing a population of one thousand five hundred inhabitants or upwards, as ascertained by their last population returns made pursuant to Act of Parliament." It is admitted that the "population returns" means the census returns; and it is not pretended that the Census Commissioners or the enumerators can, by their acts, make that which is a town not a town, or convert that which is not a town into a town. One thing absolutely clear is that there is no possible way of ascertaining from the census returns as a certainty the population of an undefined town. Where there is an existing borough or town with boundaries exactly defined the population can be accurately ascertained, but in all other cases this cannot be done. Instead of observing any legal definition of town, the Census Commissioners have for their own convenience in enumeration invented an artificial aggregation of houses—twenty is, I think, the number—as constituting a town. Admittedly, this plan adopted by the Commissioners does not help us. Until the boundaries have been determined by some competent authority it must be the merest matter of surmise what really constitutes a town. The unit called a town does not necessarily correspond to any ordnance area or description. It may represent a straggling community or villas surrounded by large gardens, but at what precise point the line should be drawn for the purpose of definition no one can determine by reference to the census returns; but under the Act of 1854 boundaries, however they are to be ascertained, are essential for the purpose of setting the statutory machinery in motion. Take sect. 4 alone.

(1) 2 L. R. Ir. 316.

Appeal. 1917. The meeting prescribed by it is to be summoned by two or more justices of the peace resident within ten miles of such town. If you have not got a boundary, you cannot find out who may be justices of the peace residing within ten miles, and you can never have your meeting; nay, even though some portion of your aggregation of houses may by a mere guess be taken as containing 1500 inhabitants, you still cannot determine who the justices of the peace are, for the centre from which to reckon the distance cannot be fixed—the measurement from the supposed centre is as illusive as the boundary line. It has been suggested, however, that this difficulty can be got over in some way by not reading the Act strictly. I have heard with a great deal of natural sympathy that kind of argument in other cases, but it does not commend itself to me in a case where a most beneficial Act of Parliament for the improvement of the conditions of living in the kingdom of Ireland would, by a narrow interpretation, be rendered practically inoperative.

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A perfectly simple and, to my mind, natural and practical construction can be put upon the statute by taking the town to be the area fixed by the Lord Lieutenant's order under sect. 4 of the Act. It was rather suggested during the argument that the area embracing the 1500 inhabitants must be a place with a name, but it is quite possible it may have none, or that there may be close to one another two districts containing groups of houses having different names, with a space between incapable of exact description. The case of Killiney and Ballybrack was mentioned as an example in the Court below and here; but it is only necessary, by way of illustration, to refer to the form in the schedule to the Act for convening a meeting of occupiers and lessors. It first deals with the case of a city or town in the following words:—"Or where the boundaries have been ascertained by the Lord Lieutenant's order under this Act within the boundaries following; viz., repeat them as in the said order."

This alone demonstrates that the householders of the city or town in sect. 4 are not necessarily the householders of some area that is popularly called a town, but are, and in most cases must be, householders within the boundaries which have been marked out upon a map which has to be approved or disapproved of by

the Local Government Board, formerly by the Lord Lieutenant. The town mentioned in sect. 6 is, of course, the town dealt with in sect. 4, and that must be something in existence antecedent to the making of the boundaries for the purposes of this Act, and, as I have already pointed out, something in respect of which by measurement one could ascertain the two or more justices resident within the prescribed distance. Not only cannot the initial step be taken without first setting out the boundaries, but that is the very thing contemplated by the schedule to the Act relating to the convening of the meeting.

I do not use the schedule as in any way controlling the Act; but it is the form prescribed in sect. 6, and the only way in which sect. 6 and this form can be made to work in harmony with sect. 4 in every case, is by reading town as being a place in connexion with which boundaries are proposed for the purpose of the Act, irrespective of whether there is a town of the name in existence or not, and thus avoiding the construction just referred to, which would make the operation of the Act impossible. The Lord Chief Justice has laid stress on sect. 1, and I respectfully adopt his observations. The schedule form is now gone, and, under statutory authority, a new form, which is the one employed in the present case, has been adopted. This form, in lieu of the words which are in the original schedule, refers to the district as "the area within the boundaries hereinafter specified, which area is herein referred to as the town of Howth." This alteration is quite in accordance with what appears to me to be the clear and true construction of the original Act, and to express accurately its scope and object.

The decision in *The Queen (Dixon) v. The Local Government Board* (1) was pressed upon us. The manner in which the Act has been worked by the Local Government Board since that decision in 1878 shows that the vice of the order made by the Board in that case was that Strandtown, the proposed township, as sought to be defined under sect. 4, did not contain the necessary number of inhabitants. If, however, this be not the true reading of the case, I decline to adopt or follow it on this point. A passage in the judgment of May C.J., at page 318, is

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capable of bearing the interpretation put upon the case by Mr. Jellett. If that be its meaning, I differ from it; but with regard to another part of that decision I shall have something more to say hereafter.

The Local Government Board, through their counsel, in answer to a question which I put—and indeed also on the affidavits filed—said they were most anxious to obtain a decision from the Court on the true construction of the Act of Parliament, and not to rely on the effect of sect. 15. of the statute. A similar course was taken by them in *Dixon's Case* (1); and, I suggest, for the same reason sect. 15 is not referred to by May C.J. or FitzGerald J. So far as my judgment is concerned, I wish carefully to guard myself against deciding the present contest on the effect of sect. 15. The Court below has done so, but as, in my opinion, a decision on sect. 15 is not necessary for the determination of the question involved, I think it is better to allow it to remain open for future argument.

The appellants in the present case applied on two separate occasions for writs of certiorari. In the first instance they applied for a certiorari to quash proceedings taken under sect. 4, and this was refused on the ground that the application was premature until a final determination had been made. An appeal was taken to us from that order, and it was arranged that the case should stand over, inasmuch as a final determination had been made between the date of the application and that of the appeal, and that the appellants would move also for a certiorari in reference to the final adjudication. This they have done, and both appeals are now before us.

It has been suggested in the course of the argument, and is the subject of decision by the Court below, that once the Local Government Board have made their final order sect. 15 ousts the jurisdiction to grant a certiorari. There is no doubt that the words of the section are enormously strong. The production of a printed copy of the *Gazette* shall be "deemed and taken to be in all courts and places final and conclusive evidence for all purposes that all proceedings, acts, matters and things required by this Act to be had or done for the adoption of this Act, in whole or

in part, were well and sufficiently done, and that the Act is in force, in whole or in part, as the case may be, in the town to which such notice relates." It is not disputed that these words preclude any possibility of attacking the validity of the order of the Local Government Board in any collateral proceedings; but it is contended that they do not take away the jurisdiction of the Court where the basis of the whole proceedings is attacked. It is also suggested that it would be most unjust, if the appellants were entitled to a certiorari in the first instance, that they should be deprived of it by something happening before they could bring their case to the Court of Appeal. Mr. Justice Gibson was struck by this view, and he suggested that the remedy might possibly be by an injunction. I wish to abstain from giving any decision on either branch of this argument.

I also refrain from expressing a decided opinion as to the effect of *R. (Eustace) v. The Local Government Board* (1), followed by *R. (Green) v. The Local Government Board* (2). *Dixon's Case* (3), in addition to deciding one proposition, with which I am unable to concur, also decided that an order by the Local Government Board under the statute under review could be the subject of certiorari. In terms that decision, so far as it relates to the Act of 1854, has not been questioned since 1878; but it is now said that it is necessarily inconsistent with the decision of this Court in *Eustace's Case* (1).

In *Eustace's Case* (1) two questions were considered—(a) whether the order sought to be quashed was a mere ministerial order? (b) whether, having regard to the section of the Labourers Act, which is not more extensive than sect. 15 of the Act of 1854, the Court had any jurisdiction? With regard to the first question, it would occur to me that both the order under sect. 4, also called an order under sect. 5, and the final order approved of are each in the nature of judicial determinations, and are not merely ministerial acts. In the case of sect. 4 this conclusion follows from the view which I have taken of the functions of the Local Government Board under that section. It appears to me it is their duty to consider, when an application under sect. 4 comes before them, a number of matters; and, if

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necessary, to have an inquiry, formal or informal; or, at any rate, to ask for such information as will enable them to weigh the question involved, and come to a decision. The boundaries proposed may be too extensive, or they may be inconvenient; or other questions may arise the determination of which may be something more than ministerial. The initial point is, what constitutes the artificial town which is to be subsequently operated upon; and if I be right in the view that judicial determination is involved, then would arise the further question, whether the appellants were to be deprived of their rights because they could not bring their appeal here until the final approbation was given.

It must not be forgotten that in *Eustace's Case* (1) the Local Government Board did not require to be satisfied of anything except that certain prescribed regulations had been complied with, and that without any inquiry they may make the order under the Labourers Acts. If an order is made without inquiry, and if all that can be done is merely the mechanical ascertainment of certain dates, it may be suggested that the order in that case is only ministerial and certainly different from the final order in the present case, and may be different from the order under sect. 4. I do not think that the Lord Chancellor's judgment turned on this view; but Lord Justice Holmes, at p. 180, says he considers it the essence of a judicial act that it involves the exercise of judgment, and that it depends upon such exercise whether it is to be done or left undone, showing, I think, that he had this distinction in his mind; and Lord Justice Cherry, at p. 183, says he thinks "the intention of Parliament was manifest and plain to withdraw altogether from the cognizance of the courts of justice all questions as to the service of notices and other formal steps." All the members of the court apparently agreed that the confirmation of the provisional order in that case was not a judicial act; but I do not think that the decision determines a case like the present, where the exercise of judgment was certainly required before the making of the final order, and also probably before the making of the order under sect. 4. In saying that I think the question is not determined by *Eustace's Case* (1) I am not to be

(1) 44 I. L. T. R. 176.

taken as deciding whether or not there is really a distinction, and my view is that the question is still open.

The question as to the effect of sect. 15 is, however, a much more formidable one. Here again *Eustace's Case* (1) has been taken as a conclusive authority that even where the order itself is assailed as distinguished from its validity in collateral proceedings jurisdiction is taken away. This is a question of great importance, and as I do not think the determination of the point necessary for our decision in the present case, and as, speaking for myself, I do not think it was conclusively decided in *Eustace's Case* (1), I wish to guard myself against expressing confirmation of the view held by the King's Bench, but without saying that they may not be perfectly right. There is no doubt that our modern legislation has shown a strong tendency to give legislative powers to public bodies, and to make them sole judges of fact within the ambit of their jurisdiction, and it may well be that this is one of the cases in which these extensive powers are conferred.

Undoubtedly in *Eustace's Case* (1) the application was one to impugn by certiorari the order itself, and beyond all doubt Sir Samuel Walker was of opinion—and expressed it—that having regard to the terms of sect. 6 of the Labourers Act, 1906, the production of the order was conclusive evidence that it was intra vires in all respects; and he cites approvingly *Ex parte Ringer* (2). Speaking for myself I think that *Ex parte Ringer* (2) must be taken as a perfectly correct decision upon the words of the English statute dealt with, and which provided that an order “when so confirmed shall become final and have effect as if enacted in this Act, and the confirmation by the Board shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act.” It may be that this is only a distinction without a difference; but I do not think that the other members of the Court of Appeal based their decision upon it on this ground. As I understand their judgments they based it upon the view that the order was a mere ministerial order. Holmes L.J. says at p. 181:—“Mr. Ronan has offered an

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(1) 44 I. L. T. R. 176.

(2) 73 J. P. 436.

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 1917. . . valid confirmation, and he has endeavoured to show by contrasting
 R. . . this provision with sect. 29 of the Educational Endowments
 (N. DUBLIN R. D. C.) (Ireland) Act, 1885, that the draftsman, although intending to
 L. G. B. . . give to the confirmation the force which I have ascribed to it,
 v. . . failed to do so. I do not agree with this. If the confirming
 Sir Ignatius J. . . order was a judicial determination by the Board, like the Order of
 O'Brien C. . . the Privy Council referred to in the Act of 1885, there might be
 some weight in Mr. Ronan's proposition; but if it be, as I hold,
 only a ministerial act, I am of opinion that the words of the clause
 carry out what was intended." This may or may not be a sufficient
 distinction. The report was probably not revised; but the learned
 judge has guarded himself against deciding any propositions
 except one based upon the view that the order was only a ministerial
 act. Apparently the mind of Cherry L.J. was running in the same
 direction as that of Lord Justice Holmes.

All I wish to emphasize in the present case is that I think the question may not be absolutely concluded by *Eustace's Case* (1), and that I consider that a question of such far-reaching importance should not be determined until the necessity for such determination exists.

RONAN L.J. :—

Sect. 1 of the Towns Improvement (Ireland) Act, 1854, provides as follows:—"The following words and expressions in this Act shall have the meaning hereby assigned to them unless there be something in the subject or context repugnant to such construction (that is to say)—The word 'town' shall mean and include a city, town corporate, borough, market town, or other town in Ireland containing a population of one thousand five hundred inhabitants or upwards, as ascertained by their last population returns made pursuant to Act of Parliament." This is mandatory. Sect. 4 says:—"Upon the application of twenty-one or more householders of any city or town . . . applying that this Act . . . may be carried into execution in such city or town, which application shall specify the boundaries proposed for the purposes of this Act . . . it shall be lawful for the Lord Lieutenant of Ireland,

one month after the receipt of such application, and if he shall approve of such proposed boundaries," to direct a meeting to be convened for the purpose of considering the carrying of the Act into execution. I can at present see nothing in the subject or context to prevent the statutory definition of town in sect. 1 being applied to sect. 4; and I am not prepared to hold that Howth (which plainly did not come within that definition at the date of the application in this case) was a town within the meaning of sect. 4. Compliance with the provisions of sect. 4 seems a clear condition precedent to putting the Act into execution, and it seems to me that unless one starts with a town of 1500 inhabitants in the census, the Act cannot be worked; but I refrain from giving any decision on this point, as it is not necessary to do so in the view I take of sect. 15. Sects. 6 to 13 provide for the meeting and the passing of a resolution adopting the Act in whole or part. If such a resolution is passed, sect. 15 provides for its transmission to the Lord Lieutenant, and provides thus:—"And within one month after such resolution or determination shall have been so certified, in case such resolution or determination shall be in favour of adopting the execution of this Act in whole or in part, and in case the Lord Lieutenant shall approve of the same, he shall notify his approbation thereof to the said person or persons, and fix the number of Commissioners to be elected for carrying this Act into execution in such town." The order under sect. 4 fixes the boundaries. The order under this part of sect. 15 fixes the number of Commissioners; but neither of the orders brings the Act into operation, and so far they have no operation. If nothing more were done, there would be no result. But the section proceeds:—"And cause notice of such approbation to be published in the *Dublin Gazette*." It will be observed that there is no provision for the making of any order that the Act shall come into operation. It is brought into operation by the statutory effect given to the publication in the *Gazette* by the words which follow in the section, viz.:—"And from and after a day to be named in such notice" (the day is only to be named in the notice and not in the approbation) "either the whole of this Act, or the portion thereof so adopted and approved, shall be applicable to and in force in such town."

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It is obvious that the publication in the *Gazette* is the document which brings the Act into operation. None of the previous documents has any legal operation on rights of persons until this publication has been made and the date fixed by it. In the present case the order under sect. 4 is represented by the order of the 17th January, 1917, the approval of the resolution and the fixing of the number of Commissioners by the order of the 22nd March, 1917. Both Orders are mentioned in the conditional order. The publication in the *Gazette* was made on the 23rd March, 1917. It is not referred to in the conditional order. This, in my opinion, is immaterial, as we should certainly amend by inserting it if necessary to raise the real question in the case. That question is, in my opinion, whether there is now existing a valid document, the legal effect of which is that "the Towns Improvement (Ireland) Act, 1854, shall be applicable to and in force in" the town of Howth from and after October 1st, 1917. The order of the 22nd March purports to be a declaration and a giving of notice. It is so drawn that when transmitted to the local persons it is a notice of the approval, and when published in the *Gazette* it is an effective notice of the approval, of the resolution and of the day on which the Act is to come into operation. The publication in the *Gazette* of the 23rd of March on its face complies with the provisions of the Act. Sect. 15 proceeds, after the clause last quoted, thus:—"And the production of a printed copy of such *Gazette* containing such notice shall be deemed and taken to be in all Courts and places final and conclusive evidence for all purposes that all proceedings, acts, matters, and things required by this Act to be had or done for the adoption of this Act, in whole or in part, were well and sufficiently done; and that the Act is in force, in whole or in part, as the case may be, in the town to which such notice relates." This appears to me a plain unequivocal enactment that if, at any time, a question should arise as to whether the Act is in force, the production of a *Gazette* is finally to settle the question. This provision is obviously taken from sect. 49 of the Incumbered Estates Court Act of 1849, passed five years before (now represented by sect. 85 of the Landed Estates Court Act of 1858). In *Tottenham's Estate* (1), Christian L.J., speaking

of this provision, said:—"And to dispel all misgivings as to the impregnability of his (the purchaser's) position, there was added that wholly unique provision in the 49th section, till then without a parallel, I believe, in our law, by which, if there was anything that could be done or consented to by any human being by which wrong could be turned into right, all Courts were enjoined to presume conclusively that such act had been done or that such consent had been given." This provision of sect. 15 is more specific and stronger than sect. 16, sub-s. 4 (*d*), of the Labourers Act, 1906, on which *Eustace's Case* (1) was decided.

The finality of the conveyances of the Incumbered and Landed Estates Courts has been established beyond all question.

Sect. 15 says the Lord Lieutenant shall cause notice of such approbation to be published, and by implication fix the day to be named in the notice.

It is plain that the Act specifies many prior acts to be done by others, some involving judicial discretion and some ministerial acts to be done by them. These acts are all, in my opinion, conditions precedent to the final publication to which statutory effect is given by the section. I think the Court is precluded from any inquiry into the performance of any of these conditions precedent, and that sect. 15 is conclusive in the case.

As to certiorari, in this case I assume that we are bound by decisions of this Court to hold that orders made by the Local Government Board are, in certain cases, subject to removal by certiorari into the High Court. However, it is equally settled by the Irish authorities that an order of the Local Government Board which does not per se impose liability or alter rights is not subject to certiorari (see *R. (Wexford County Council) v. Local Government Board* (2), pp. 368-9, and cases cited). The order which came before the Master of the Rolls was of this class. It has no operation until approved of under sect. 15. I am, therefore, of opinion that the order of the Master of the Rolls should be affirmed.

The order of the 22nd March, as I have pointed out, does not per se impose liability or alter rights. It seems to me difficult to hold that by itself it can be subject to certiorari. If that order

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were now quashed and a question were raised as to the Act being in force, I find it difficult to see what a Court should do on production of a copy of the *Gazette*. It is obvious that all copies of the *Gazette* could not be brought up on certiorari to be quashed. These considerations seem to me to confirm the view I have taken of sect. 15.

As to the terms "judicial," "ministerial," and "administrative," and the reference to these terms in the *Wexford Case* (1), the judgments of Lord Loreburn in *Board of Education v. Rice* (2), and Lord Haldane and the other Lords in *Local Government Board v. Arlidge* (3), must be considered in future cases on the subject. Lord Parmoor's judgment in the last case, at p. 140, appears to go the full length of the Irish cases on certiorari. Lord Moulton, at p. 146, says:—"It was not intended that the Local Government Board should act in a purely judicial capacity. There is no doubt that it must act in a 'judicial temper.'" He adds, at p. 149:—"I do not wish by this judgment to give any countenance to the view that certiorari is a proceeding applicable to administrative orders made by such a department of State as the Local Government Board under statutory powers such as we have here to deal with." At p. 133 Lord Haldane confines himself to adopting the language of Lord Loreburn in *Board of Education v. Rice* (2), viz.:—"If the Board failed in this duty, its orders *might* be the subject of certiorari, and it must itself be the subject of mandamus."

In these circumstances, I have confined my judgment to the effect of sect. 15, and assumed that the real question can be raised on certiorari.

MOLONY L.J. :—

I regret that I am unable to concur in the judgment of the Court.

By sect. 1 of the Towns Improvement Act, 1854, "the word 'town' shall mean and include a city, town corporate, borough, market town, or other town in Ireland containing a population of 1500 inhabitants or upwards, as ascertained by their last population returns made pursuant to Act of Parliament." Sect. 4 of the

(1) [1902] 2 I. R. 349.

(2) [1911] A. C. 179.

(3) [1915] A. C. 120, at pp. 132,

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Act provides that "upon the application of twenty-one or more householders of any city or town in Ireland . . . applying that the Act or the specific portion thereof (described as thereinbefore provided) may be carried into execution in such city or town, which application shall specify the boundaries proposed for the purposes of the Act, it shall be lawful for the Lord Lieutenant, one month after receipt of such application, and if he shall approve of such proposed boundaries, to order and direct that the mayor or other chief magistrate of such town (being a corporate town), or the chairman of the municipal commissioners under the Municipal Corporations (Ireland) Act, 1840, wherever the same shall be in force, or any two or more justices of the peace resident within ten miles of such town, shall convene a meeting for the purpose of considering the carrying of the Act into execution."

Howth is admittedly not a city, town corporate, borough, or a market town, and, consequently, in order to come within the definition of a town under the Act, it must contain a population of 1500 inhabitants or upwards, ascertained as above mentioned. When we look at the census return for 1911, made in pursuance of the Act of Parliament, we find the population of Howth town therein stated to be 1357, and it is also stated that it stands on a townland of the same name, and that its estimated area is 35 acres. In the application, which does not even purport to be from the electors of Howth, but from the electors "within the boundaries, hereinafter specified, of the town or district of Howth or Sutton, in the county of Dublin," the proposed boundaries include not only the town and the remainder of the townland of Howth, but also several other townlands, comprising in all 2900 acres, with a population of 3267; and it is contended that the Act is applicable to Howth because, although the town of Howth, as it appears in the census returns, contains a population of less than 1500, the population comprised within the proposed boundaries exceeds that figure.

It is stated in the affidavit of the Secretary of the Local Government Board that it is the practice of the Board, in cases of towns having no defined boundaries, to ascertain the population according to the last census within the proposed boundaries, which are the creation of the framers of the application. I am

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unable to see that there is any legal foundation for this practice. It is quite true that the Legislature knew, at the time of the passing of the Act, that it was no part of the duty of the Census Commissioners to define the boundaries of towns, and that in estimating the population of a town the procedure adopted by them must be more or less arbitrary in the case of many towns; but, with this knowledge, the statute provides that a town, to come within the provisions of the Act, must have a population of 1500, as ascertained by their last population returns, made pursuant to Act of Parliament.

The Act of 1854 is intituled "An Act to make better Provision for the Paving, Lighting, Draining, Cleansing, Supplying with Water, and Regulation of Towns in Ireland." The towns referred to are not towns which are the creation of the person who first drew up the application to the Local Government Board, but towns which, at the moment, exist, and whose population can be ascertained by reference to the last census returns. The "last population returns made pursuant to Act of Parliament" referred to the Act of 1850 (13 & 14 Vict. c. 44), then in force, and under which the population in 1851 had been ascertained. The word "census" is not used in the Act of 1850, or in the Towns Improvement Act, 1854. The term used in these statutes is "population returns"; and it was not until 1860 that the word "census" was used. Sect. 2 of the Act of 1850 provides how the account of the population was to be taken. The officers employed for the purpose "shall severally visit every house within such districts as may be assigned to them respectively and take an account in writing according to such instructions as may be given to them by the Chief or Under-Secretary to the Lord Lieutenant." It is unnecessary to discuss the subsequent sections until we come to sect. 9, which provides what is to be done by the persons who have taken these returns, or, as they are called, "accounts of the population." They were to certify the correctness of the accounts, and transmit them to such persons as the Lord Lieutenant should appoint to receive them within each county, city, town, or place, and these persons had to digest the information collected. Coming back to sect. 1 of the Act of 1854 we find the phrase "other town in Ireland containing a population of 1500

inhabitants or upwards as ascertained by their last population returns made pursuant to Act of Parliament." Unless a town fulfils that condition it is not within the Act; and it fulfils that condition only after a census of the population has been taken, and transmitted to the proper officers appointed to receive it within the town, and it has been digested by them. That is the return referred to in the Act. I am satisfied that the Act of 1854 is not an Act for the creation of towns; It is an Act to make better provision for existing towns; and, in order to bring a place within the definition of "town" in sect. 1, it must have a population of at least 1500 inhabitants. The place said to be a town in the present case has an area of 35 acres, and a population of 1357, according to the census of 1911.

Until 1900 there was no statutory mode of proving the population of a town. In the Census (Ireland) Act of that year there is a provision, repeated in sect. 8 of the Act of 1910, to the effect that a certificate from the General Register Office, purporting to be signed by the Registrar-General, "shall be admitted in any court of law as evidence of the population at the census taken under this Act of any county, borough, town, district, or other area to which it refers." In the present case we have a certificate from Sir William Thompson, the Registrar-General, stating that the population of the town of Howth was 1357 on the 2nd April, 1911. In my opinion the town referred to in the certificate is the only town which can be taken into consideration for the purpose of determining whether the Act of 1854 applies. It is quite true that there may be a difficulty in measuring the distance of the residence of the magistrates when there are no definite boundaries. The Census Commissioners have no statutory authority to lay down the legal boundaries of a town, but in practice they must necessarily fix the area before they ascertain the population. My construction of the statute is that it is meant to refer to an existing town having a population of 1500, as ascertained by the last census, and not to a town which is the mere creation of the draftsman of the notice under sect. 4. I am of opinion that in this case there was not in existence a town to which the Act could be applied. It was quite right that sect. 4 of the Act of 1854 should provide, as it does, that the

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 R. subject to the approval of the Lord Lieutenant, now the Local
 (N. DUBLIN Government Board; but that provision does not do away with
 R. D. C.) the necessity of having, as a condition precedent to the application,
 v. the town in existence, with the prescribed population.
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Let us now look for a moment at the case of *R. (Dixon) v. The Local Government Board* (1), where this precise matter was considered thirty-nine years ago. That case was subjected to a good deal of criticism in the court below and they declined to follow it. May C.J. said in *Dixon's Case* (1):—"It is one thing to apply the provisions of this Act of Parliament to an existing town, and a totally different thing to create and call into existence a town, or rather a township, and render this new creation subject to the statute. In the present case the Act cannot be called into operation, as there exists no subject-matter to which it can be properly applied. With reference to the jurisdiction of this court to interfere, we are clearly of opinion that the action of the Local Government Board in this matter involved acts and determinations of a judicial character, and, therefore, proper to be reviewed by this court. The determination of the boundaries of the proposed town involved important consequences to those found within the prescribed limits, subjecting them to local taxation, and to a code of local laws. We think the conditional order for a certiorari must be made absolute." In my opinion the judgment in *Dixon's Case* (1), which after full consideration was approved of by Palles C.B. in *R. (Wexford County Council) v. Local Government Board* (2), is good sense and sound law.

It is, however, contended that *Dixon's Case* (1), so far as it decides that the order of the Local Government Board was of a judicial character, has in effect been over-ruled by *Eustace's Case* (3). In *Eustace's Case* (3) an order of the Local Government Board made under sect. 6, sub-s. 4 (d), of the Labourers (Ireland) Act, 1906, was held to be of a ministerial character. The decision in *Eustace's Case* (3) does not affect that in *Dixon's Case* (1). An examination of the section under review in *Eustace's Case* (3) will

(1) 2 L. R. Ir. 316.

(2) [1902] 2 I. R. 349.

(3) 44 I. L. T. R. 176.

show that it is equally applicable whether the determination was judicial or merely ministerial; and in this connexion we must have regard to the subsequent judgment of the Chief Baron in *The King (Duff and Kelly) v. Deane and the County Court Judge of Tyrone* (1), to be found in the judgments collected by the Local Government Board. In that case Palles C.B. said:—"The section mentions a number of acts, some of which are ministerial and some judicial, and then follow the words, 'have the effect of an Act of Parliament.' And I am of opinion that under the decision of the Court of Appeal the section applies to judicial acts, just as it was held in *Eustace's Case* (2) to apply to ministerial acts." I think this is a clear case for certiorari, unless I am precluded from giving effect to my view by sect. 15 of the Act of 1854, which I will now proceed to consider.

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—
Molony L.J.

The resolution and determination of the meeting of the electors were duly approved of by the Local Government Board under the provisions of sect. 15 of the Act, and they have caused notice of their approbation to be published in the *Dublin Gazette*; and the section provides "*from and after a day to be named in such notice in that behalf*" either the whole of the Act, or the portion thereof so adopted and approved, shall be applicable to and in force in such town, and the production of a printed copy of such *Gazette* containing such notice shall be deemed and taken to be in all courts and places "final and conclusive evidence for all purposes that all the proceedings, acts, matters, and things required by this Act to be had or done for the adoption of this Act, in whole or in part, were well and sufficiently done, and that the Act is in force, in whole or in part, as the case may be, in the town to which such notice relates." The notice provided that all the provisions of the Act of 1854 were to be applicable to and in force within "the town of Howth" from and after October 1st, 1917. In my opinion once the Act comes into operation the notice in the *Gazette* is final and conclusive, and no one is at liberty to question the validity of the proceedings by which that place has been made a town; but until the Act comes into operation, that is October 1st in the present case, it does not apply. Therefore I think that in

(1) Unreported, King's Bench Division, 24 January, 1913.

(2) 44 I. L. T. R. 176.

Appeal. this case sect. 15 is no answer to the case made by the prosecutors
 1917. for the writ of certiorari, and that the conditional order ought to
 R. be made absolute.
 (N. DUBLIN As regards the order of the Master of the Rolls, I agree that
 R. D. C.) it should be affirmed on the ground that the order of the Local
 v. Government Board made under sect. 4 did not affect rights or
 L. G. B. impose liabilities, and therefore could not be the subject of
 Molloy L.J. certiorari. The order per se had no validity, but was only a step
 to an effectual binding order. *The King (Jordan) v. Enniskillen
 Urban District Council* (1).

Solicitor for the appellants: *L. J. O'Neill.*

Solicitor for the Local Government Board: *James Meccredy.*

Solicitors for Local Government electors: *Hunter & Burland.*

C. L.

(1) [1902] 2 K. B. 452.

O'BRIEN *v.* CAVANAGH.

K. B. Div.

1918.

Jan. 3.

Practice—Writ of summons—Indorsement—Substituted service—Costs.

A writ in a case where service out of the jurisdiction has been allowed, or in a case where an order for substituted service within the jurisdiction is contemplated, indorsed with a claim for £2 10s. for costs, "and such further sum for obtaining the order as may be allowed on taxation," is regular.

MOTION to set aside a writ of summons as irregular by reason of the fact that the claim for costs indorsed on the writ included unascertained costs; and, further, that the said unascertained costs were costs of an order to substitute service, not then obtained; and that the said indorsement was not in compliance with Order 3, rule 8, and was in consequence embarrassing.

The writ of summons was specially indorsed under Order 3, rule 6, and the indorsement for costs upon it was as follows:—
"And £2 10s. for costs and taxed costs of order to substitute service."

R. R. Smylie, in support of the application:—

Under Order 3, rule 8, the actual sum claimed in respect of the demand and also the sum for costs must be indorsed on the writ. The word "respectively" in the early part of the rule leaves no other construction open. *Flatau v. Cullen* (1) was argued and considered in the light of such an accepted meaning of the rule. Secondly, though substituted service was effected in this case, yet the defendant being out of the jurisdiction, the indorsement as to payment within four days is bad, and should be extended to the time allowed for entering an appearance.

Joseph Kenny, for the plaintiff:—

Order 3, rule 8, only applies to the amount of the costs which can be ascertained, and are set out in the rule. In Ireland there is no scale by which a plaintiff can claim the costs of substituted service. In England there is such a scale: Annual Practice, vol. i, p. 26. *Flatau v. Cullen* (1) is really an authority for the plaintiff, as in that case there was no indorsement on the writ for the costs of the substituted service.

(1) 81 L. T. N. S. 402.

K. B. Div. DODD J. :—

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Flatau v. Cullen (1) is in reality opposed to Mr. Smylie's contention. In that case the writ was indorsed with a sum of £3 3s., the ordinary costs of the writ corresponding to £2 10s. under our rules. The question was as to the sum to be allowed by the taxing master for substituted service outside this; and it was held that a practice of allowing a fixed sum of £1 was bad. A writ, in a case where service out of the jurisdiction has been allowed, or in a case where an order for substituted service within the jurisdiction is contemplated, indorsed with a claim for £2 10s. for costs, "and such further sum for obtaining the order as may be allowed on taxation," is regular (*Wylie's Judicature Act*, 1906, p. 195). The indorsement, mentioned at p. 26 of the *Annual Practice*, 1918, as having been settled by Ridley J. in *Jarman v. Pavey* (2), is quite in accordance with this. The motion must be refused with costs.

The form approved of by the judge would, therefore, be: The plaintiff's claim is for £2 10s. for costs and such additional sum as may be allowed on taxation, for

- (a) "the order for service out of the jurisdiction";
- (b) "an order for substitution of service."

Solicitor for the plaintiff: *Lewis P. Gleeson*.

Solicitors for the defendant: *Molloy, Fayle, & Co.*

A. E. C.

(1) 81 L. T. N. S. 402.

(2) Noted at p. 26 of the *Annual Practice*, 1918.

R. (KENNELLY AND OTHERS) v. BROWNE, LOCAL
GOVERNMENT BOARD AUDITOR (1).

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1917.

Nov. 26, 27.
Dec. 14.

Local Government—"Inmate of the workhouse"—*Destitute poor person*—
Poor person—*Poor Relief (Ireland) Act, 1862 (25 & 26 Vict. c. 83), s. 7.*

The words "any inmate or inmates of the workhouse," in sect. 7 of the Poor Relief (Ireland) Act, 1862 (25 & 26 Vict. c. 83), are confined in their interpretation to the destitute poor, and do not extend to persons who, although poor, are not destitute, and have been admitted to the workhouse infirmary for temporary medical or surgical relief.

CERTIORARI.

The applicants, members of the Listowel Board of Guardians, were surcharged by the respondent, a Local Government Board auditor, in respect of certain payments authorized by them for expenses incurred by the Board of Guardians in respect of a man named Edmond M'Enery, whom they had sent for special treatment to the Cork Eye, Ear, and Throat Hospital. It was agreed on both sides that M'Enery, though a poor person, was not a destitute poor person. The application was by way of certiorari to bring up and quash the surcharge as illegal.

Serjeant M'Sweeney K.C. (with him *M'Elligott K.C.*, and *Bernard Roche*), for the applicants:—

There are two main classes of people who are the objects of poor-law relief, namely, 1, entirely destitute persons; 2, poor persons as distinct from destitute persons, persons who are unable to pay for medical relief, and are admitted into the infirmary of the workhouse. The question to be decided in this case is: Are class 2 "inmates of the workhouse" within the meaning of sect. 7 of the Poor Law Relief (Ireland) Act, 1862? Can they be sent by the guardians to some extern hospital for special treatment? Sect. 14 of the Poor Relief (Ireland) Act, 1843 (6 & 7 Vict. c. 92), for the first time introduced medical relief, and provided for deaf and dumb or blind children. Sect. 16 of the same

(1) Before SIR JAMES CAMPBELL C.J., and MADDEN and PIM JJ.

K. B. Div. Act is the genesis of the workhouse infirmary. The relief
 1917. given by it is confined to "poor persons affected with fever
 R. or other dangerous contagious disease." It is to be observed that
 (KENNELLY) the words used are "poor persons," not "destitute poor persons."
 v. The authority to give medical relief was extended by sect. 3 of
 BROWNE. the Poor Relief (Ireland) Act, 1862, which again uses the words
 "poor persons," to all classes of medical and surgical cases.
 Sect. 4 provides that poor persons admitted into the infirmary
 of the workhouse must, if able to do so, repay the cost of their
 maintenance therein. Sect. 5 deals with constabulary patients.
 Sect. 6 relieves from disfranchisement poor persons who claim to
 pay the cost of their maintenance. Sect. 7 is the section upon
 which this case turns. It is the only section in the Irish poor
 relief code in which the words "inmate of the workhouse" are
 used in reference to persons entitled to medical relief. The code
 uses the words "poor person" when a poor person unable to pay
 for medical relief is meant. When a person is transferred from
 the workhouse proper to the workhouse infirmary, does he cease to
 be an inmate of the workhouse? Every person must be first
 admitted to the workhouse proper. There is no method by which
 a poor person can be admitted straight into the infirmary. The
 workhouse rules use the word "pauper" all through. [He
 referred to articles 1, 2, 5, 6, and 68 of the Workhouse Rules,
 Mooney's Compendium, p. 283.] Sect. 7 of the Act of 1862 refers
 to the category of persons mentioned in the preceding sections of
 the Act who are called "poor persons." In sect. 2 the words
 "destitute poor persons" are used, while in sects. 3, 4, and 6 the
 words are "poor persons." Therefore, the words "inmate of the
 workhouse" in sect. 7 include both "destitute poor persons" and
 "poor persons." Sect. 6 of the Act of 1862 shows that both poor
 persons who do not claim to pay for their maintenance and
 destitute poor persons are disfranchised; they are both put into the
 same category. Both categories are admitted to and become
 inmates of the workhouse. A "destitute poor person" means a
 person who cannot pay for the necessities of existence; a "poor
 person" is a person who can pay for the necessities of existence,
 but cannot pay for medical relief. The duty of the auditor in
 dealing with public bodies is confined to surcharging them for

-1, illegal expenditure; 2, any deficiency or loss caused to the ratepayers by their "negligence or misconduct": Local Government (Ireland) Act, 1902 (2 Edw. VII. c. 38), sect. 20. [He also cited Poor Relief (Ireland) Act, 1838, sects. 3-41 and 49; Parliamentary Voters (Ireland) Act, 1850 (13 & 14 Vict. c. 69), sect. 111; Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), sect. 90; Workhouse Rules of 11th September, 1897, article 2, appendix to Mooney's Compendium, p. 96.]

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—
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S. L. Brown K.C. (with him *Wood*), for the auditor:—

"Inmate of the workhouse" in this section means a destitute poor person in the workhouse at the time. A destitute person is a potential inmate of the workhouse at all times. A person who is admitted for medical or surgical treatment, that being the purpose of his admission, is not an "inmate of the workhouse." All through this poor law code down to the Act of 1862 a distinction is made between "destitute" and "poor." Sect. 49 of the Act of 1838 uses the word "inmate." At that period no one but a destitute person could be an inmate of the workhouse. Sects. 14 and 15 of the Act of 1843 use the word "destitute." Sect. 16 of that Act is the first place in the code in which a "poor person" is mentioned. In sect. 18 "inmate" is used with reference to a "destitute poor person." The preamble of the Poor Relief (Ireland) Act, 1847 (10 Vict. c. 31), for the first time gave the guardians power to relieve destitute poor persons outside the workhouse. In sects. 13 and 14 of the Act the word "inmate" is used in connexion with emigration. Sect. 20 enables the Local Government Board to purchase land for a cemetery "for the burial of deceased inmates of the workhouse." There is no provision enabling a poor person other than a destitute poor person to be buried at the expense of the rates. Sect. 3 of the Act of 1862 enables the guardians to admit "any poor persons requiring medical or surgical aid in hospital" into the workhouse infirmary. They are nowhere given power to admit "poor persons" into the workhouse. If this section is read along with sect. 16 of the Act of 1843, it can only apply to the infirmary. Sect. 6 of the Act of 1862 is a purely franchise section. Sect. 7 includes the cost of bringing a person back from the extern hospital to the workhouse as

K. B. Div. well as the cost of sending him to the extern hospital and of
 1917. maintaining him when there. No part of such cost could be
 R. recovered under either sect. 4 or sect. 6 from a "poor person"
 (KENNELLY) who was able to pay. All that the guardians could recover
 v. from him would be the cost of his maintenance in the work-
 BROWNE. house infirmary. If the Act contemplated that "poor persons"
 should be sent to extern hospitals, the Legislature would have
 enabled the guardians to recover the expenses of so doing
 from persons able to pay. The form of the general register of
 persons received into the workhouse, required by sect. 42 of the
 Act of 1838 to be kept, will be found at p. 332 of Mooney's
 Compendium. The keeping of the special register of persons able
 to pay for their maintenance is prescribed by sect. 6 of the Act of
 1862, which is a franchise section. It is the receipt of poor law
 relief which disfranchises; but persons on this special register are
 not in receipt of poor law relief, because they are paying for them-
 selves. I submit that such persons never become inmates of the
 workhouse for the purpose of sect. 7. [Campbell C.J.—You are
 driven to argue that sect. 7 introduces an entirely new subject-
 matter.] Sect. 7 is the only section which amends the law dealing
 with the relief of the destitute poor. Prior to this Act the power
 to send destitute poor persons from the workhouse to a fever
 hospital was that given by sect. 15 of the Act of 1843, and there
 were "poor persons" in the workhouse at the date of that Act, as
 they are mentioned in sect. 16. It is impossible to argue from the
 fact that poor persons in the workhouse infirmary are under the
 control of the Master of the workhouse that they are "inmates"
 of the workhouse for the purpose of sect. 7 of the Act of 1862.

Wylie K.C. (with him *Sealy*), for the Local Government Board:—

There is no such thing in this case as an absolute argument. You can only look through the Acts and rely on matters here and there which all point the same way. The "destitute poor person" is the man for whose benefit these Acts were passed; he is a potential member of the workhouse family, and is entitled to remain in the workhouse if he likes; the "poor person" is not intended to benefit by the Acts. The titles and preambles of the

Acts of 1843 and 1862 are the same; they are both Acts amending the law for the relief of the "destitute poor in Ireland." In all the passages where the word "inmate" is used it refers to the destitute poor. It is a term of art. The words at the end of sect. 7 of the Act of 1862 apply to chargeability, and do not confer power to recover the cost from poor persons. They merely take the place of the words in sect. 15 of the Act of 1843. We contend that sect. 7 of the Act of 1862 is an extension of sect. 15 of the Act of 1843, and not of sect. 16, and can only apply to the persons mentioned in sect. 15, namely, "destitute poor persons." The cost which can by sect. 4 of the Act of 1862 be recovered from a poor person able to pay is not to exceed "the average of the general cost of maintenance, medical and surgical treatment" in the hospital; it does not include any establishment charges. By sect. 5 a constable admitted to the hospital is to contribute "the full average cost of daily maintenance and establishment charges, medical and surgical treatment" in the hospital; while by sect. 7 the cost of conveying an inmate to and from and of maintaining and treating him in an extern hospital is to be deemed "part of the cost of maintenance and treatment of such inmate in the workhouse," thus including the general establishment charges of the workhouse.

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M'Elligott K.C., in reply.

Cur. adv. vult.

The judgment of the Court was delivered by SIR JAMES CAMPBELL C.J.:—

Dec. 14.

The question in this case is a narrow one, but by no means easy of solution. Shortly stated, it is whether the words "any inmate or inmates of the workhouse" in the Poor Relief (Ireland) Act, 1862 (25 & 26 Vict. c. 83), sect. 7, are to be confined in their interpretation to the destitute poor or extend to other persons who, though poor, are not destitute. Under the terms of the section the guardians of any union are empowered to send any inmate or inmates of the workhouse of such union requiring medical or surgical treatment to any outside hospital or infirmary. The applicants are members of the Listowel Board of Guardians who had been surcharged by Mr. Browne, the Local Government Board

K. B. Div. Auditor, in respect of certain payments authorized by them, for
 1917. expenses incurred by the guardians in respect of a man named
R. Edmond M'Enerly, who, under the provisions of this section, had
 (KENNELLY) been sent by them for special treatment to the Cork Eye, Ear, and
v. Throat Hospital, and they now applied to this Court by way of
BROWNE. certiorari to bring up and quash the surcharge as illegal.
 Sir James Affidavits were filed upon both sides raising small controversies
 Campbell C.J. of fact; but it was agreed, and we think rightly, that the case
 should be argued upon the assumption that M'Enerly, though a
 poor person, was not a destitute poor person, and that his claim to
 be regarded as an inmate of the workhouse should entirely rest
 upon the fact that he was admitted from outside to the infirmary
 of the workhouse for surgical or medical treatment.

Prior to the passing of the Poor Relief (Ireland) Act, 1843 (6 & 7 Vict. c. 92), the Irish Poor Relief Acts were confined in their application to "the destitute poor," and we were informed by counsel that nowhere in the Acts was there to be found any express definition of the meaning of these words, but I have found in the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), sect. 41, words which I think were intended to be, and may be accepted, as an appropriate definition—namely, "poor persons . . . unable to support themselves by their own industry, or by other lawful means." By sect. 15 of 6 & 7 Vict. c. 92, the guardians are empowered to pay out of the rates, to be raised under 1 & 2 Vict. c. 56, the expense incurred in conveying any "destitute poor person" from the workhouse of the union to any fever hospital or lunatic asylum, and in maintaining any such destitute poor person in such fever hospital. Section 16 further enables the guardians to provide relief for "poor persons" affected with fever or other dangerous contagious disease, in a house or houses hired or rented for the purpose, or by appropriating for the same purpose such portion or portions of the union workhouse as the guardians, with the consent of the Poor Law Commissioners, should consider it safe and convenient to be so applied. It will thus be seen that persons to be provided for under this latter section are "poor persons" and not "destitute poor persons." So the matter remained until the passing of the Poor Relief (Ireland) Act, 1862 (25 & 26 Vict. c. 83), the material sections of which,

other than sect. 7, upon the construction of which the present question directly arises, are sects. 3, 4, and 6. Section 3 begins by reciting the provisions of sect. 16 of 6 & 7 Vict. c. 92, and goes on to enact as follows:—"That it shall be lawful for such guardians to admit into the infirmary of the workhouse any poor persons requiring medical or surgical aid in hospital," &c. Section 4 provides that every "poor person" admitted into the infirmary of the workhouse under this sect. 3, or into the fever hospital under sect. 16 of 6 & 7 Vict. c. 92, shall, if considered by the guardians to be able to pay in whole or in part the cost of his maintenance while in hospital, be required to pay such proportion thereof as the guardians shall determine, but in no case should such proportion exceed the average of the general cost of maintenance, medical and surgical treatment in such hospital or infirmary.

Sect. 6 releases from disfranchisement all such poor persons, provided they claim on admission to repay the entire cost of their maintenance in such hospital or infirmary; and further enacts that all such persons so claiming shall be entered in a separate register from that in which the other persons admitted into the workhouse are registered.

Sect. 7 contains the power, already referred to, to send any inmate or inmates of the workhouse requiring special medical or surgical treatment to any hospital or infirmary.

Upon behalf of the applicants, it has been contended that as the infirmary is part of the workhouse, all poor persons admitted into it are necessarily admitted into the workhouse, and consequently are literally inmates of the workhouse, and within the provisions of sect. 7. The auditor and the Local Government Board, upon the other hand, contend that the words "inmates of the workhouse" must receive a limited construction, and are confined to destitute persons who are compelled to find a home within the workhouse proper, and are, in popular language as well as in the Poor Law Relief Acts themselves, often described as "paupers."

In support of the applicants' view counsel have called our attention to the many provisions to be found in the different Acts for the appointment of workhouse officials, for the maintenance of order and discipline, &c., all of which deal with the workhouse as

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a whole, and draw no distinction between any of its constituent parts, such as the hospital or infirmary. They also argue that once the Legislature provided for the admission to the workhouse of poor persons requiring medical or surgical treatment in the hospital or infirmary of the workhouse, it was a simple and natural consequence to provide the power to send any of such persons who required special treatment to some extern hospital or infirmary. Such general considerations are more or less a begging of the question at issue; but they have found in the provisions of sect. 6 an argument of a very different and more serious character, which constitutes the strength of their position, and has created in my mind some difficulty and doubt. The Poor Law Relief Acts require the keeping of three separate and distinct registers of all persons in receipt of poor law relief. One is "The out-door relief register," prescribed by the Poor Relief (Ireland) Act, 1847 (10 Vict. c. 31), s. 11, which in no way affects the present case. The second is a register of "persons admitted into and relieved in the workhouse," as prescribed by 1 & 2 Vict. c. 56, s. 42; but inasmuch as such relief was at that time confined to "destitute poor persons," it could not, and did not, at the date of its origin apply to "poor persons." The difficulty, however, to which I have referred was created by sect. 6 of 25 & 26 Vict. c. 83, which called into existence the third register under the following conditions. It provides, as I have already pointed out, that all poor persons admitted under the provisions of sect. 3 of the same Act, or of sect. 16 of the Act 6 & 7 Vict. c. 92, to the hospital or infirmary of the workhouse, might escape disfranchisement by claiming to repay the entire cost of their maintenance; but it also enacts that all such persons "shall be entered in a separate register from that in which the other persons admitted into the workhouse are registered." It is contended, and obviously with truth, that amongst the other persons so "admitted into the workhouse," are included, as distinguished from destitute poor persons, all poor persons who upon their admission to the hospital or infirmary do not claim to repay the entire cost of their maintenance; and undoubtedly in practice the section has always been so construed, and all such persons have been entered upon the same register as contains the names of the destitute poor persons who go into the workhouse as pauper inmates.

I have felt throughout the case the force of the argument based upon this section, but, after careful consideration, we are satisfied that it is not conclusive, and that it must yield to other considerations which lead to the contrary conclusion. In the first place, this section has a distinct purpose and subject-matter of its own, namely, the relief, from the penalty of disfranchisement, of poor persons admitted to the hospital or infirmary, provided they comply with a certain condition. Further, we are not satisfied that the mere fact that the names of the other poor persons so admitted are placed upon the general register is sufficient to constitute them "inmates of the workhouse" within sect. 7. Ever since the reign of Queen Elizabeth "inmates" is an expression denoting a familiar class, and specially associated with those destitute poor persons or paupers who are compelled to find a home in the workhouse. Several examples of the appropriate use of this term "inmates" will be found in the antecedent Irish legislation; as, for example, in sect. 18 of 6 & 7 Vict. c. 92, which deals with the emigration of destitute poor persons who are inmates, and sect. 20 of 10 Vict. c. 31, which enables a cemetery to be provided for the burial of deceased inmates. Sects. 3, 4, 5, and 6 of the Act 25 & 26 Vict. c. 83, seem to be exceptions to its general purpose, which, by the preamble, is stated to be "to amend the laws in force for the relief of the destitute poor in Ireland," and in the note at the foot of page 222 of Banks' Irish Poor Law it is stated that sect. 7 was passed to extend the power already given in regard to fever patients by sect. 15 of 6 & 7 Vict. c. 92. That is to say, the intention was to extend the power of sending "destitute poor persons" from the workhouse to a fever hospital, to a further power to send them to an extern hospital or infirmary, just as sect. 3 was intended to extend the power conferred by sect. 16 of 6 & 7 Vict. c. 92, of admitting "poor persons" to the fever hospital of the workhouse by enabling them to be admitted into the infirmary of the workhouse for medical or surgical treatment.

This construction, which has the authority of the text-writer, who was an admitted expert on the subject, seems to us to coincide with the structure and machinery of the different sections under consideration; and, if it is the true construction, it is fatal to the

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K. B. Div. applicants' case. It is materially corroborated, in my opinion,
 1917. by the concluding paragraph of the section itself, which reads as
 R. follows:—"And the entire cost of such maintenance, treatment,
 (KENNELLY) and conveyance as aforesaid shall be deemed part of the cost of
 v. maintenance and treatment of such inmate or inmates in the
 BROWNE. workhouse of such union."
 Sir James
 Campbell C.J.

It was contended by counsel for the Local Government Board that whereas under sect. 4 provision is made for the recovery, in whole or in part, in the case of poor persons of sufficient ability to pay, of the cost of their maintenance in the infirmary of the workhouse, no similar provision is to be found as to their cost of maintenance in the extern hospital or infirmary—an omission strongly leading to the inference that they were outside the scope of sect. 7; but this has been met on the other side by the suggestion that such cost could be recovered under the concluding words of the section, which I have already quoted. Upon comparison, however, of the portions of the two sections 4 and 7, which deal with the cost of maintenance, it will be found that a cardinal distinction exists. Under sect. 4 the "poor person" of sufficient ability to pay is only liable for the average of the general cost of maintenance, &c., in such hospital or infirmary, whereas under sect. 7 the cost is "the cost of maintenance [&c.] in the workhouse," which would include the general establishment charges of the workhouse as a whole.

In my opinion these concluding words of sect. 7 were only inserted in order to enable the guardians to defray such cost out of the rates raised under the Poor Relief Acts, and not as imposing a liability upon the patient or defining its amount. We have not been referred to, nor have I been able to discover, any provision in any statute by which a poor person who is not "destitute" is in any circumstances eligible for ordinary indoor relief in the workhouse, and I cannot hold that a limited right of admission to the fever hospital of the workhouse for the specific purpose of isolation and treatment, or to its infirmary for medical or surgical treatment, constitutes the poor person so admitted an "inmate" under sect. 7. Serjeant M'Sweeney in the course of his argument put the case of a "destitute poor person" who is admitted for the first time, not to the workhouse proper, but to its hospital or

infirmary, and asked if it was contended upon the other side that such a destitute poor person was not "an inmate" within sect. 7, and was, therefore, ineligible for transference for special treatment to an extern hospital or infirmary. Mr. Wylie in his reply appeared to admit that such a destitute poor person would, in the circumstances, be eligible because he was, though not an inmate in fact, a potential inmate as a member of the class qualified to become inmates. It seems to us that this is not a reasonable or logical contention, and that the true answer is that such a person is not eligible, inasmuch as he has not in fact qualified as "an inmate." Though "destitute," the poor person in question has remained outside the workhouse; it never has been his "home"; and he was admitted, not for the purpose of ordinary indoor relief, but only for surgical or medical relief. Finally, it has been urged that the position taken up by the Local Government Board imposes hardships upon a deserving class, namely, poor persons who, though not destitute, are unable to afford the expense of special medical or surgical treatment, but it has to be remembered that such persons are ex concessis not destitute, and have provided for them within their own county fully equipped county hospitals and infirmaries in which they can obtain free of expense, or at a trifling cost, the services of men of science and skill in every branch of the medical profession. Were it open to the guardians, as they thought fit, to ignore these local institutions, and send poor patients from the hospital or infirmary of workhouses situate in the remote parts of Ireland to Dublin, Belfast, or Cork for special treatment, an excessive burden might be imposed upon the local rates. Authorities such as boards of guardians are, however well-intentioned, amenable to local pressure, and grave abuses must almost certainly arise in the exercise of such an unlimited discretion. It was probably a consideration of this nature that induced Parliament to confine their selection to "inmates of the workhouse," to the exclusion of persons who were admitted to the workhouse for temporary medical or surgical relief; and being of opinion that this is the true construction of the language of sect. 7 we must refuse this application. It has been suggested that the purpose of the section upon this construction could be defeated in every case by the

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(KENNELLY)
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BROWNE.

Sir James
Campbell C.J.

K. B. Div. admission of such poor patients to the workhouse proper, if only
 1917. for a day, as was in fact the plan adopted by the Listowel
 R. guardians in the present case. I am not to be taken as imputing
 (KENNELLY) mala fides to them in the adoption of such a course, inasmuch as
 v. they may well have thought that in this way they were comply-
 BROWNE. ing with the letter of sect. 7 and qualifying the patient, as "an
 Sir James inmate of the workhouse," for transmission to some extern
 Campbell C.J. hospital for special treatment; but it is right that they should
 know that, upon the construction which we have placed upon the
 section, any such device would be not only colourable but also
 unlawful, and that they are violating the law in admitting such
 persons by the back door, as it were, into the workhouse proper.
 I notice from the affidavits that the Local Government Board
 have in all previous cases of this nature remitted the surcharge
 while affirming its legality, and such action upon their part was
 intelligible so long as the legal position was in doubt, but if our
 decision in this case remains unchallenged, or is affirmed upon
 appeal, the Local Government Board would be well advised in
 informing the guardians throughout the country that in future
 cases of the kind the plea of ignorance of the law can no longer
 avail. In view of the understanding between the parties, and the
 general application of our decision to all boards of guardians, we
 shall allow the auditor and the applicants their costs, to include in
 the case of the latter the costs of attending in Dublin to complete
 the recognizances.

Solicitor for the applicants; *Henry J. Marshall.*

Solicitors for the auditor: *D. & T. FitzGerald.*

Solicitor for the Local Government Board: *James Mccredy.*

G. B. H.

STONE AND ANOTHER v. HAMILTON (1).

K. B. Div.

Money-lender—Re-opening closed transactions—Lapse of time—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1.

1917.
Nov. 7, 8,
13, 21.

A defendant was sued by a firm of registered money-lenders for the balance due on foot of a promissory note dated the 5th of April, 1916. With his defence he paid money into Court (which was drawn out by the plaintiffs in full satisfaction of their claim), and counter-claimed to have five former transactions dated in February, 1911, March, 1912, February, 1913, March, 1914, and March, 1915, respectively, re-opened on the ground that they formed one and the same transaction, that the rates of interest charged therein were excessive, and that the transactions were harsh and unconscionable. Each of the five former transactions had been closed at the end of its respective year without any objection by the defendant.

Held, that in the absence of any active malpractice, deception, or unfair pressure on the part of the plaintiffs, it was impossible to re-open dealings voluntarily settled so long ago.

NEW TRIAL MOTION.

This action was tried before Dodd J. without a jury on the 28th and 29th of June, 1917. The plaintiffs were Charles Stone and Isadore Stone, who were a firm of money-lenders registered in London and trading as C. Stirling. The action was for £80, the balance due on foot of a promissory note for £160 for value received, which the defendant had signed in favour of the plaintiffs as security for a loan of £100. The promissory note was dated the 5th of April, 1916, and the amount thereof was repayable by four quarterly instalments of £40 each, the first of which was to become due and payable on the 5th of July, 1916, and if default were made in the payment of any one or more of the instalments, or any part thereof, the whole balance was then to become due and payable. The defendant paid two of the instalments and made default in the payment of the third. The writ was issued on the 22nd of February, 1917. The defendant paid £38 into Court with his defence, namely, £20, the balance of the sum actually lent to him, and £18 for interest, and pleaded that there had been

K. B. Div. other transactions of loan between him and the plaintiffs extending
1917. over the period from February, 1911, to March, 1915. He averred
STONE that the interest charged in respect of the sums actually lent to
v
HAMILTON. him by the plaintiffs was excessive, and that the said transactions
were harsh and unconscionable, or such that a Court of Equity
would give him relief in respect thereof. He accordingly pleaded
a counter-claim, in which he averred that the said transactions
were one and the same transaction, and claimed that the same
should be re-opened and an account taken, and that any sum paid
by him to the plaintiffs over and above the amount found by the
Court to be due from him to them should be repaid by them to
him. The plaintiffs accepted the £38 so paid into Court in satisfac-
tion of their claim against the defendant. At the trial the learned
judge gave judgment for the plaintiffs on the counter-claim with
costs.

The facts of the case were as follows :—

The defendant was a retired Major residing in Co. Cavan. He was a Deputy-Lieutenant for the county, and a graduate of Trinity College, Dublin. He had a landed estate of about 1,000 acres in the county, and considerable holding in the Ulster Bank, and also some shares in the London and North-Western Railway Company. He also carried on business in cattle. The dealings between the plaintiffs and the defendant began with the following letter, dated the 24th February, 1911, from the defendant to the plaintiffs:—"Dear Sir, I received your circular a few days ago, in which you say you lend money for a short time at 5 per cent. I shall be greatly obliged if you will lend me £250 or £300 for about twelve months, and pay you back so much every three months. I want the money just now very badly. Yours truly, William S. Hamilton." To which the plaintiffs replied, saying that in order to enable them to go into the matter of the proposed loan they would be glad if the defendant would kindly let them know the total amount of his income from all sources, and other particulars relative to his position. The defendant replied on the 27th February, 1911, stating that he had about eleven or twelve hundred a year, besides a good deal of timber which he could sell. The plaintiffs then replied on the 28th February, 1911, enclosing

bank notes value £125, and a promissory note for £200, payable by four quarterly instalments, which was duly signed by the defendant. On the 27th February, 1912, the plaintiffs wrote to the defendant saying that they noticed that the balance of his account would become due on the 1st of March, and that thinking that he would possibly like to have some further cash they enclosed bank notes value £75, which, together with the £50 owing on his account, made a total new advance of £125. They also enclosed a new promissory note for £200 payable by four quarterly instalments, which was duly signed by the defendant. On the 27th of February, 1913, the plaintiffs wrote to the defendant a letter to the same effect as that of February 27th, 1912, and the defendant again signed a new promissory note for £200. Exactly the same thing occurred in February, 1914. In February, 1915, when the plaintiffs by letter made a similar offer of a new loan, the defendant replied on February 28th, 1915, as follows:—"Dear Sir, I received your registered letter enclosing a new bill to be signed for £200, also notes to the amount of £75 and a stamped receipt. I would like to know before I sign the papers, if I pay you out the £50 that is now due to clear off the old bill, what interest will you charge on the £75 if I keep it, and let me pay you so much every three months. Yours, etc." To which the plaintiffs replied on March 2nd, 1915:—"Dear Sir, I am obliged for your letter of the 28th ult., contents of which duly noted, and with regard to the matter in question, shall be pleased to let you have the advance of £75 in exchange for your promissory note payable by four quarterly instalments of £28 15s. each. . . . I shall be pleased to receive your remittance for £50, and will then return to you the old documents duly cancelled. Yours, etc." Accordingly the defendant signed a new promissory note, dated March 2nd, 1915, for £115, made up as follows:—fresh advance, £75; interest, £40. On some date during the month of March, 1915, the defendant paid off the £50 balance owing on foot of the promissory note of February, 1914. On the 13th March, 1916, the plaintiffs wrote to the defendant to acknowledge the receipt of a remittance which settled their account with him, and returned his promissory note dated March 2nd, 1915, duly cancelled. On the 3rd of April, 1916, the defendant wrote to the plaintiffs asking for a loan of

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ONE
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K. B. Div. £100, and saying, "let me know what interest you will charge, and let me pay you so much every three months." To which the
 1917.
 STONE
 v.
 HAMILTON. plaintiffs replied on April 5th, 1916 :—"Dear Sir, I am obliged for your letter of the 3rd inst., and shall be pleased to let you have the advance required, upon your promissory note payable by four equal quarterly instalments of £40 each, commencing on the 5th of July next." They enclosed in their letter bank notes value £100, and the promissory note the subject-matter of the present action.

At the trial the only evidence given on behalf of the plaintiffs was that of their manager, and was as follows :—

"Are you the manager for Messrs. Stone, who carry on a money-lending business under the name of C. Stirling?"
 "I am."

"When applications are made to you for loans, is there a recognized agency that you apply to for information?"
 "There is."

"What is the name of it?" "Perry's." [Serjeant Matheson. I object to what passes between them.] [Mr. Justice Dodd. He cannot give evidence of that. You can ask him, did you make inquiries.]

"After you got a letter, did you make the usual inquiries?"
 "I did."

The defendant moved for judgment or for a new trial of the counter-claim on the grounds that the judgment was wrong in law and against the evidence and the weight of evidence, and that the learned judge who tried the counter-claim misdirected himself in holding that the fact that the rate of interest charged in respect of the sums actually lent was excessive was not sufficient (*a*) to show that the transactions, the subject of the counter-claim, were harsh and unconscionable, or (*b*) that they were otherwise such that a Court of Equity would give relief against and re-open the same.

Serjeant Matheson K.C., with him *Samuel Moore*, for the defendant :—

Our argument is that there was no substantial risk taken by the plaintiffs such as would justify any interest over 100 per cent.

The history of the transactions between the plaintiffs and our client makes that perfectly clear. The highest rate of interest which I have found allowed in any reported case is 30 per cent. in *Wolfe v. Lowther* (1). In the present case the learned judge in the Court below thought that there must be "oppression" in the old Chancery sense contrary to the decision of the House of Lords in *Samuel v. Newbold* (2). [He also cited *Poncione v. Higgins* (3); *Kerman v. Wainewright* (4); *Halsey v. Wolfe* (5); *Wells v. Joyce* (6); *Thomas v. Ashbrook* (7); *Wade v. Schaffer* (8).]

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v.
HAMILTON.

Lardner and *Hanna K.C.*, for the plaintiffs:—

On our principle of calculation, the rate of interest on each of these six transactions was 96 per cent. In March, 1916, the defendant settled all his accounts with us, and was quite satisfied. Having come back to us in April, 1916, and having got a new loan in the repayment of which he has made default, is he now to be allowed to re-open all the six transactions, including the five which were closed in March, 1916? The mere presence of a default clause which was never put into operation cannot be relied upon as a ground for upsetting the transaction: *Fieldings v. Coventry* (9). In determining whether or not a transaction is "harsh and unconscionable," the test is what actually happened. In the present case, on every occasion on which an instalment became due, default was made by the defendant, but the plaintiffs did not take advantage of it. In order to re-open the transaction, the Court must hold not only that the interest charged is excessive, but that the transaction is harsh and unconscionable. There was no evidence before Dodd J. to show that the transaction was harsh and unconscionable.

We also contend that the defendant is bound by his pleading to treat the whole transaction as one and entire, as in fact it was. He paid money into Court in respect of this one and entire transaction, and we have taken that money out, and that is an end of it. If we are wrong in that assumption, and the transaction was

(1) 31 T. L. R. 354.

(2) [1906] A. C. 461.

(3) 21 T. L. R. 11.

(4) 32 T. L. R. 295.

(5) [1915] 2 Ch. 330.

(6) [1905] 2 I. R. 134.

(7) [1913] 2 I. R. 416.

(8) Collard on the Moneylenders Act, 1912 ed., p. 416.

(9) Collard, pp. 35, 227.

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not one and entire, we submit that the fact that we have taken the money out of Court wipes out the last note, leaving the five previous notes, which were all overlapping and connected with each other. The Court is not inclined to re-open old transactions, and is very critical of persons who seek to re-open old transactions, by reason of what happened afterwards. The defendant never felt those transactions burdensome, and never made any complaint about them until his legal advisers made one for him. [Kenny J.: Is there any case in which lapse of time has been relied upon against reopening old transactions?] Yes. *Kerman v. Wainwright* (1), judgment of Swinfen-Eady L.J. The defendant was informed at the outset what premium he would have to pay, and that was what was of importance to him. To reduce the premium to a rate of interest is quite misleading. The transaction is much plainer to a borrower if you say to him, "You will have to pay so much premium." A shilling in the pound at the end of a week is 200 per cent. per annum; but it is a reasonable premium. In *Carringtons, Limited, v. Smith* (2) Channell J. said (at p. 91): "In the present case there was a default clause, but I think the defendant quite understood and appreciated it. He was clearly confident of his ability to pay, and that he would not make default . . . I would also point out that the Money-lenders Act does not, as the Bills of Sale Act, 1882, did, require that the interest should be rateable interest. When a loan is to be for an indefinite time, of course the rate of interest is all-important; but where the loan is for a definite period, repayable by instalments or otherwise, I do not think the borrower generally cares very much what the rate of interest on the amount from time to time outstanding as his instalments are paid works out at. What he does want to know is how much he has to pay for getting the accommodation which he asks; and when a person of intelligence and business habits ascertains and understands that, I am not sure that it is very material whether he understands the real rate per annum of the interest or not." [Gibson J.: That proposition is got rid of by *Thomas v. Ashbrook* (3).] Under the Act two elements must be present—1, the interest charged must

(1) 32 T. L. R. 295.

(2) [1906] 1 K. B. 79.

(3) [1913] 2 I. R. 416.

be "excessive," and, 2, the transaction must be "harsh and unconscionable." There must be some standard of "excessiveness." How is it to be arrived at? All the circumstances of the case must be looked at; and they are not all on the side of the borrower. The money-lender's position must be considered. The longer he lies out of his money the lower the rate of interest is, because he is only getting the premium in any case, which is a fixed sum. On the second branch of the section, is 80 per cent. shocking in itself? There is no suggestion that the defendant could have got the money from any other money-lender at a lower rate. [They also cited *Harris v. Clarkson* (1); *King (Limited) v. Currie* (2).]

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HAMILTON.

Moore, in reply:—

We submit that the rate was excessive, and the transaction harsh and unconscionable, for the following reasons:—1, No real risk was run by the lender. The evidence shows that the borrower's financial position was sound. He paid off all the loans except the last regularly, and the money-lender gave him the second, third, fourth, and fifth loans unasked; in fact, he forced the money into his hands: *Lewis v. Mills* (3). 2, The default clause puts and keeps the borrower absolutely in the power of the money-lender: *Halsey v. Wolfe* (4). 3, The rate of interest ought to have been specified: *Fieldings v. Pawson* (5), Farwell L.J. (at p. 237). The defendant wrote time after time asking for the rate of interest, but he never got a straight answer. The fact that the plaintiffs have accepted 25 per cent. is a very good indication what the fair rate of interest was. There is jurisdiction to re-open all the former transactions, which are all in reality one and the same transaction. The second loan arose out of the first, the third out of the second, and so on. [He also cited *Stirling v. Musgrave* (6).]

Cur. adv. vult.

(1) 27 T. L. R. 30.

(2) 28 T. L. R. 10.

(3) 30 T. L. R. 438.

(4) [1915] 2 Ch. 330.

(5) Collard, p. 228.

(6) 29 T. L. R. 333.

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GIBSON J. :—

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Nov. 21.

The counter-claim seeks to re-open five bill transactions, which, commencing in February, 1911, and ending March, 1915, were closed by final payment in March, 1916. The pleading avers that this group of dealings was one and the same transaction with the note sued on in the action, in respect of which £38 was lodged in Court and accepted by the plaintiffs in satisfaction, the rate of interest being 25 per cent. instead of the much higher rate of charge on the face of the note. Serjeant Matheson in his opening relied on *Samuel v. Newbold* (1) and no other authority, though that case in the House of Lords, decided on facts wholly unlike this case, did not deal with the closed transaction, the considerations affecting which were discussed in *Saunders v. Newbold* (2) in the Court of Appeal. The recent case of *Thomas v. Ashbrook* (3) was not cited to my brother Dodd, with the result that he excluded evidence offered for the plaintiff (but not pressed) as to inquiries before the initial loan, and did not examine or express any conclusion as to the rate of interest or the defendant's means. He was impressed with what he considered a pleading difficulty from the defendant having paid money into Court when the counter-claim alleged all the transactions were one and the same. The note sued on in the actions arose out of two letters, April 3rd, 1916, and April 5th, 1916, and was quite independent of the previous notes, though, no doubt from his earlier dealings, the defendant had acquired a "homing instinct" to the plaintiffs, towards whom he entertained, in his simplicity, then unsophisticated by legal advice, a feeling of friendly gratitude. If the series of dealings represented one transaction, linked together ab initio, I should hesitate to say that the right of redress, whether asserted by counter-claim or in an original action, was lost by the defendant paying into Court reduced interest at 25 per cent. to get rid of the original action. It is curious that though the reply (rightly in my opinion) traversed the allegation of unity of transaction, Mr. Hanna K.C. at the trial insisted that the evidence proved the transaction was entire—a contention which, in my view of the case, might support the defendant's claim to re-open. The acceptance of the reduced

(1) [1906] A. C. 461. (2) [1905] 1 Ch. 260. (3) [1913] 2 I. R. 416.

interest might be relied on as showing the rate in the note was excessive. K. B. Div.
1917.

Mr. Hanna made five points at the trial. The first two relate to the oneness of the transaction and to the form of the pleading. The third was as to absence of deception, &c.—matters which, though essential to equitable relief before the Act, would not affect the defendant's statutory right to redress, as *Thomas v. Ashbrook* (1) and other cases show. The fourth point was that the defendant was a Deputy-Lieutenant and a graduate, not one of the class within the Act. The reasoning in *Thomas v. Ashbrook* (1), *Lewis v. Mills* (2) (where the defendant was a brigadier-general), and *Wolfe v. Lowther* (3) (where the defendant was an educated, intelligent gentleman of twenty-eight years of age) is opposed to any such contention. The fifth and most serious point was that the transaction was settled, and that no special circumstances were shown. He did not refer to the rate of interest (which was apparently not considered by the judge) or discuss whether it was out of proportion to the risk, or deal with the default clause as possibly making the transaction unconscionable in character, though the clause was never put in force. The clause was never explained to the defendant, and was only mentioned in one letter, 15th June, 1911, when it was referred to in terrorem.

The two combined conditions for relief are excess of charge and unconscionableness—both matters of fact depending on the particular circumstances of each case. The following points, therefore, would require consideration apart from Mr. Hanna's fifth point as to the transactions having been closed and settled:—
1. What was the rate of interest? 2. Was it excessive, having regard to the risk? 3. If excessive, was it unconscionably so?

None of them is dealt with in my brother Dodd's judgment, which was based mainly on the loans being long since closed.

1. According to the plaintiffs' method of calculation, taking each payment as in reduction of principal (and not, as in *Abrahams v. Dimmock* (4), as first in payment of interest, and then towards principal) the rate of interest, if the instalments had been punctually paid, worked out to 96 per cent.; but as payment was

(1) [1913] 2 I. R. 416.

(2) 30 T. L. R. 438.

(3) 31 T. L. R. 354.

(4) [1915] 1 K. B. 663.

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Gibson J.

K. B. Div. 1917. delayed it was lower, somewhere around 80 per cent. According to the defendant, the rate was $133\frac{1}{3}$ per cent., and for the subsequent notes much higher. I do not adopt his figures. Whether the plaintiffs' computation is correct, like other judges I decline to affirm. I agree, however, with Mr. Lardner that in dealing with a closed transaction the rate actually charged is what is material, and that a dormant default clause never used for any purpose is irrelevant as to excess, though it may be material, where excess is proved, in reference to the inquiry whether such excess is unconscionable. The rate of interest was not stated at the trial on either side, and it was only under pressure from the Court that the competing calculations were made and put forward.

2. What was the risk, in actual fact, or as it was contemplated by the money-lender? This depends on the following matters:—
(a) What was the defendant's property and income? (b) What were his liabilities? (c) What information had the lender?

Had *Thomas v. Ashbrook* (1) been before counsel, the defendant would have been directed to have had ready for the Court a statement of his means in 1911 and subsequently, his charges, debts, &c. His evidence is regrettably loose. I do not analyze it in detail. The plaintiffs apparently accepted the defendant's letter of 27th February as satisfactory, and remitted the sum lent on 28th February, 1911, without having the protection of a signed note. The only inquiry that the plaintiffs appear ever to have made was from Perry's on February 26th, 1911, after Major Hamilton's initial letter on February 24th. This communication, plainly evidence as to the risk contemplated and unconscionableness (see *Thomas v. Ashbrook* (1), and *Saunders v. Newbold* (2)), was objected to and was not pressed. Before us counsel consented that it should be read, though afterwards, when it had been read, he wished to withdraw such consent. It purports to show applications, whether successful or not, for amounts not disclosed, to other money-lenders. There was apparently no attempt to test the statements in the defendant's letter, taken as substantially true, as to his property. The whole course of dealing then and subsequently, when the plaintiffs sent cash unasked to the defendant, indicates that the plaintiffs regarded the defendant as an unbusinesslike, but fairly

(1) [1913] 2 I. R. 416.

(2) [1903] 1 Ch., at p. 274.

solvent and honest, man—a good and safe customer. The Major, *K. B. Div.*
 with improvident recklessness, went afterwards to other money- *1917.*
 lenders—though this was apparently unknown to the plaintiffs; *STONE*
 claims from them are probably referred to in Mr. Harris's letter *v.*
 of the 3rd of February, 1917. It is said they have been all paid. *HAMILTON.*
 Whether this is so, or what was the rate of interest, was not proved. *Gibson J.*
 In many of the reported cases where relief has been given, the
 borrowers had been frequenting money-lenders, tempted by the
 apparent facility of getting advances to meet temporary neces-
 sities, urgent or supposed to be so: *e.g. Saunders v. Newbold* (1);
Stirling v. Musgrave (2); *Lewis v. Mills* (3); *Wolfe v. Lowther* (4);
Poncione v. Higgins (5); *Burton v. Swifte* (6). Such practice on
 the part of the borrower might only illustrate his foolish improvi-
 dence, and not entitle the money-lender to exact an exorbitant
 rate of interest, but in many cases it would justify the lender in
 regarding a loan on personal credit as subject to extra hazard.
 The plaintiffs' attitude in pressing on the defendant money which
 he sent without request or security has been criticized by judges
 as intended to preclude negotiation or objection to the rate of
 interest. The plaintiffs, in the correspondence which is material
 on this subject, avoided answering the defendant's inquiries as to
 the rate of interest, which the latter did not appreciate, and was
 probably not intended to understand. Mr. Hanna's argument
 that where a note does not specify interest, and charges only a
 premium, the borrower must be taken to buy the loan for a fixed
 sum, and that computation of the interest rate is immaterial, is
 contrary to common sense and the current of authority. In most
 money-lending cases the rate charged is not specified as it ought
 to be, and is concealed by the instalment system, which, with the
 default clause—essentially a penalty—imposes on the borrower an
 extravagant and unexpected burden.

If the case before us related to an open and unsettled claim,
 the conduct of the plaintiff, disclosed in the correspondence, and
 the character of the defendant, a casual, improvident man, treated
 by the plaintiff as honest and fairly solvent, able and willing to

(1) [1905] 1 Ch. 260.

(2) 29 T. I. R. 333.

(3) 30 T. L. R. 438.

(4) 31 I. L. R. 354.

(5) 21 T. I. R. 11.

(6) Collard, p. 171.

K. B. Div. pay his debt, might possibly support a claim to reduction to
 1917. 25 per cent. (the rate accepted by the plaintiffs in the original
 STONE action), notwithstanding the want of details as to the defendant's
 v. HAMILTON. property and the money-lending atmosphere into which he had
 Gibson J. strayed. Assuming that this might be so (as to which I express
 no final opinion), that is not the present situation. The trans-
 actions we are invited to re-open are a cluster going back to 1911.
 They are treated as inseparable; and the defendant's contention
 is that he is entitled to relief against all or none. Each was
 closed at the end of the year to which it relates.

That a closed transaction may be re-opened is unquestionable; but under what conditions can this be done? In the numerous cases where the Court rejected the borrower's application—much more favourable in their facts than the case of Major Hamilton—the Court gave no considered reasons for their judgment, treated as discretionary. In *Burton v. Swift* (1) Scrutton J., though reducing the interest on a current loan, declined to give his reasons for holding the rate charged excessive—a course not adopted by other judges. Mr. Matthews, in his work on Money-lenders, suggests (at pp. 99, 100) that with regard to closed transactions the Court may apply the familiar equitable principle as to laches and delay. The cases are instructive. In *Saunders v. Newbold* (2) the earlier loan for £1000 would have been current during the second loan (which was successfully attacked) but for its having been paid in September, 1903, in anticipation of the due date. The Court reversed Mr. Justice Kekewich's decision as to this loan on the ground that there was no counterclaim or independent action. What was said in the judgment did not favour any such action, and apparently none was attempted. In *Wolfe v. Lowther* (3) and in *Kerman v. Wainwright* (4), though the current transactions were re-opened, the Court refused relief as to the closed transactions. See also *Poncione v. Higgins* (5) and *Carringtons v. Valerie* (6). On the other hand, where the former payment was made under the compulsion of a writ, the application was granted: *Samuel v. Bell* (7).

(1) Collard, p. 171.

(2) [1905] 1 Ch. 260.

(3) 31 T. L. R. 354.

(4) 32 T. L. R. 295.

(5) 21 T. L. R. 11.

(6) 119 L. T. Jo. 62.

(7) 22 T. L. R. 118.

Like the English judges, I abstain from attempting any defining formula as to when past transactions ought not to be, or when they ought to be, re-opened. The circumstances should be stronger than those affording a defence to the demand the subject of the money-lender's action. The allowance of the debtor's complaint in respect of the debt sued on by no means involves that a past loan, which has been paid off, though similar in rate of charge, is also to be relieved against. The lapse of time, the delay, the defendant's letters to the plaintiffs, covering so long a period; the uncertainty of the defendant's pecuniary position, coupled with his dealings with other money-lenders; his knowledge that the rate of charge was high, though he may not have realized the precise figure; the absence of any active malpractice or deception on the plaintiffs' part, the closing of each annual loan at the end of each year without objection, the parties being at arm's length, the absence of unfair pressure, all taken together, make it impossible to re-open dealings voluntarily settled so long ago and so often.

I have not found any case which gives any semblance of support to Major Hamilton's application. The only Irish decision at all relevant in its reasoning is *Thomas v. Ashbrook* (1); but it does not apply to the case of former bygone debts settled by payment previously out of Court. The English cases are all adverse.

The judgment of my brother Dodd will be affirmed. To avoid any question on taxation, we will order that the costs of the shorthand writer and his notes are not to be allowed as part of the party and party costs payable by the defendant.

KENNY J. :—

I concur. I decide this case solely on the ground that the transactions sought to be re-opened are concluded transactions that are not, in the words of Vaughan Williams L.J. in *Saunders v. Newbold* (2), "relevant to or associated with the plaintiffs' claim in the action." There were five borrowings prior to that which is the subject-matter of this action, but they were all paid off and closed before the loan of £100 on the 5th April, 1916. They were all

K. B. Div.
1917.
STONE
v.
HAMILTON.
Gibson J.

(1). [1913] 2 I. R. 418.

(2) [1905] 1 Ch. 260.

K. B. Div. linked together and might be said to form one transaction, inasmuch
 1917. as in each of the 2nd, 3rd, 4th, and 5th cases the promissory note
 STONE included the last instalment of the previous loan. But the loan
 v. HAMILTON. in respect of which the action was brought was a completely new
 and fresh loan, in no way connected with those previously closed.
 Kenny J. I think—on the authorities—that where the transactions impeached
 have been paid off and concluded in circumstances such as exist
 here it would be impossible to re-open them.

At the same time I think it right to add that if the former loans had not been closed, there are many features in this case which would present a strong if not an unanswerable argument for re-opening the transactions. The interest seems to me to be excessive, and particularly so when taken in connexion with the default clauses and the acceptance by the plaintiffs of a much reduced rate of interest, namely 25 per cent., on the loan of 1916. Furthermore, when on two occasions the plaintiffs by letter were asked by the defendant to let him know the rate of interest, they gave him no reply. I would also gather that the plaintiffs regarded the transactions as practically unattended with risk. They made what their manager calls the “usual inquiries” from an agency as to the defendant’s position; they generally sent the amount of the cash in advance promptly and before the receipt from defendant of the promissory note securing it; their letters establish that they were inviting him to borrow, and the instalments of the notes were paid with fair regularity. The defendant was a Deputy-Lieutenant and a graduate of Trinity College, but even with these distinctions I am convinced from his evidence that, to say the least, he was not mentally fitted to understand and appreciate his position, and was incapable of making an attempt at calculating the rate of interest—an operation surrounded with difficulty—and one the solution of which has led to some perplexity in the course of the arguments.

Solicitor for the plaintiffs: *R. W. MacNeice.*

Solicitor for the defendant: *Ernest W. Harris,*

G. E. H.

MATTHEW COMERFORD, APPELLANT; v. JOHN
WILLIAM TURNER, RESPONDENT (1).

K. B. Div.

1918.

Feb. 5.

Justices—Jurisdiction—Title ousting jurisdiction—Prosecution under Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sect. 107, sub-s. 2—Nuisance—River—Sewer.

A contention, however well founded, that a river being in fact a sewer within the meaning of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), is, therefore, vested in the sanitary authority, is not a bona fide question of title, ousting the jurisdiction of justices to hear and determine a prosecution for nuisance arising out of the river, brought by the sanitary authority against the person prima facie the "owner" of the river within the meaning of that statute.

The sanitary authority of D., through the appellant, their town clerk, brought a prosecution under sect. 107, sub-s. 2, of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), against the respondent, who was the agent of the person prima facie owning a river flowing through D., charging the existence of a nuisance arising out of the flooding of the river. At the hearing before the justices the respondent contended that in fact by user the river was a sewer within the meaning of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), and was, therefore, vested in the sanitary authority. The justices, having heard evidence as to the user of the river, held that there was a bona fide and reasonable dispute as to the river being a sewer, and that such dispute constituted a bona fide claim of title, which ousted their jurisdiction.

On case stated, *held*, that the justices were wrong in law, and that they were bound to decide, first, whether the nuisance charged came within the statute under which the prosecution was brought, and in fact existed; if there was a nuisance within that statute, whether the defendant was the person who was owner of the river or responsible for the nuisance within the meaning of the statute; and that, in deciding the latter question, the justices were bound to decide whether the user of the river was such as to convert it into a sewer, under the control of the sanitary authority.

CASE STATED under 20 & 21 Vict. c. 43, by the Justices of the Peace for the County of Louth, on the application of the appellant from a decision of the justices at Dundalk Petty Sessions, held on the 19th October, 1917.

(1) Before SIR JAMES CAMPBELL C.J. and GIBSON and PIM JJ.

K. B. Div.

1918.

COMERFORD

v.

TURNER.

The following are the material portions of the case stated :—

“At the Dundalk Petty Sessions, held on the 19th of October, 1917, the complainant, who is town clerk of the Urban District Council, by whom he was duly authorized in that behalf (which Urban District Council is hereinafter referred to as ‘the appellants’), laid an information and complaint against John William Turner as agent for Earl Roden (hereinafter called the respondent), under sect. 107, sub-s. 2, of the Public Health (Ireland) Act, 1878, that the respondent, ‘being agent for Lord Roden, the owner of the Rampart River and the area through which the said river flows from Saint Alphonsus Road to Ladywell Terrace, Dundalk, in the district under the Public Health (Ireland) Act, 1878, of the Dundalk urban sanitary authority, the following nuisance exists, to wit, the rear of Dublin Street and Hill Street areas being flooded, the fields on either side covered, also the Rampart Walk itself; the water overflows on to Hill Street roadway, making it impossible for the inhabitants to leave some of the houses without getting ankle-deep into it; the ground water is almost up to the level of the floors, making them cold and damp, thereby causing a nuisance dangerous to public health; and that the said nuisance is caused by the act or default of the owner of the said premises.’”

Upon the hearing of the information, the following facts were proved or admitted :—It was admitted that a notice requiring the abatement of the nuisance complained of in the said summons had been duly served in pursuance of sect. 110 of the Public Health (Ireland) Act, 1878.

Mr. J. C. Lardner, M.P., appeared for the appellants, and in the course of his opening statement, being asked by one of the justices whether a question of title was not involved which would oust our jurisdiction, said that he understood such a case was proposed to be made by the other side, but it was not possible for them to make it, as he would produce before us the “owner” within the meaning of the Public Health (Ireland) Act, 1878, under which the prosecution was brought. Mr. Hanna, K.C., who appeared for the respondent, stated that his case was that the appellants were the owners of the river, and were bound to keep it clean as being a public sewer vested in them under the statute. He submitted that this was a bona fide question of title between

the parties to the summons, and that it ousted the jurisdiction of the Court. Mr. Lardner, in reply, submitted that this proposition of law was not applicable to a prosecution under the Public Health Act, inasmuch as the Public Health (Ireland) Act, 1878, defines the "owner" against whom the order sought should be made. We were of opinion that if it was disputed whether the respondent did or did not come within such definition, it would seem to indicate that a question of title had been raised, and that such question would oust our jurisdiction. For the purpose of determining whether it was a reasonable and bona fide question we decided that the evidence of Mr. Sellars should be taken. At the conclusion of the evidence, counsel again addressed us on the question of jurisdiction, Mr. Lardner again contending that our jurisdiction was not ousted by the raising of a question of title in a prosecution under the Public Health (Ireland) Act, 1878. The material sections of the Public Health (Ireland) Act, 1878, 41 & 42 Vict. c. 52, referred to in the arguments, are as follows:—

Sect. 2. "Owner" means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent.

Sect. 15. All existing and future sewers within the district of a sanitary authority . . . shall vest in and be under the control of such sanitary authority.

Sect. 107. For the purposes of this Act any . . . watercourse so foul or in such a state as to be a nuisance or injurious to health . . . shall be deemed to be a nuisance to be dealt with summarily in the manner provided by this Act.

Sect. 110. On receipt of information respecting the existence of a nuisance, the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose.

Sect. 123. Any sanitary authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior Court of law or equity to enforce the abatement or prohibition of any nuisance under this Act, or for the recovery of any penalties from or for the punishment of any persons offending against the provisions of this Act relating to nuisances; and may order the expenses of and incident to all such proceedings to be paid out of the fund or rate applicable by them to the general purposes of this Act.

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J. C. Lardner (with him *Dickie K.C.*), for the appellant:—

What the justices had to decide was whether there was a nuisance in respect of this river, and, as a necessary part of their adjudication, they had to determine whether the appellant was the “owner” of the river, or the person through whose “act, default, or sufferance the nuisance arose or existed” within the meaning of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sect. 107, sub-s. 2, and sect. 110.

The question as to whether the river was or was not a sewer was no more a question of title than the question that arose as to the existence or extent of a highway in *Williams v. Adams* (1) and *Leicester Urban Authority v. Holland* (2). In the former case Crompton J. (at p. 316) lays down the principle applicable to prosecutions in which justices must of necessity decide such questions, in these words: “When an Act of Parliament makes the magistrates the very tribunal to decide whether the way is a highway or not, the Legislature must have supposed them competent to decide it.” In the latter authority, where the defendant claimed a right to put goods on a footpath, Wills J. (at p. 791) says: “The learned magistrates are bound, as it seems to me, to inquire whether there is such a dedication as would make it unlawful for the occupier to put the goods upon the spot.” The question here raised by the respondent, as to the river being a sewer, cannot in principle be distinguished from the questions raised in these two cases. The justices here were, in the words of Compton J. in the former authority, “the very tribunal to decide” the point that was raised at the hearing before them.

J. C. Davison and *Henry Hanna K.C.*, for the respondent:—

The decision as to whether this river is a sewer or not necessarily involves a decision on title, for, if it is a sewer, it is vested in the sanitary authority: Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sect. 15. That is an important question, and one involving proprietary rights of a substantial kind. The principle on which questions of title oust jurisdiction of summary tribunals is well stated in *Johnston v. Meldon* (3) by Palles C.B. in these words

(1) 2 B. & S. 312.

(2) 52 J. P. 788.

(3) 30 L. R. 1r. 15.

(p. 27): "There is no doubt of the ordinary rule that, upon a bona fide claim of title to land being made before justices, their jurisdiction ceases. It does not arise from any legislative enactment, but is an old legal maxim, applicable to summary trials in general, which has been so generally applied for ages, that it is assumed to be applied by every Act relating to such matters, unless a contrary intention is clearly indicated." Once the contention was here raised that the river was a sewer, vested in the authority, whom the appellant represented, and the justices had evidence upon which they were satisfied that that contention was a reasonable one to raise, there was at once a question of title to the river *inter partes*, and that, on the principle stated by Palles C.B., could not be tried by the justices unless the Act clearly indicated a contrary intention. The statute does not so indicate, but expressly reserves to a sanitary authority the right to take proceedings in the High Court with reference to nuisances; and that Court is manifestly the proper tribunal to decide on the substantial questions here at issue: Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sect. 135.

In *Arnold v. Morgan* (1) a claim to a right of passage for the public was held to be a question of title; and in *R. (Christie and Ballantine) v. Derry Justices* (2) and *R. (Kennedy) v. Cork Justices* (3) claims of right to obstruct thoroughfares were held to be claims of title, Palles C.B., in the latter case, expressly stating that the jurisdiction conferred upon magistrates to decide on cases of obstruction was subject to ouster on a bona fide claim of title. In *Leicester Urban Authority v. Holland* (4) Field J. (at p. 790) indicated that in that case there was no evidence of a reasonable claim.

Dickie K.C., in reply:—

The evidence of the river being a sewer is very weak. In *West Riding Rivers Board v. Gaunt & Sons* (5) it is stated that the mere fact of sewage discharging into a stream is not sufficient to make the stream a sewer.

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1918.
COMER. ORD
v.
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(1) [1911] 2 K. B. 314.

(2) [1902] 2 I. R. 266.

(3) [1913] 2 I. R. 391.

(4) 52 J. P. 788.

(5) 67 J. P. 183.

K. B. Div.

SIR JAMES CAMPBELL C.J. :—

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v.

TURNER.

This is a case stated by the justices of the County of Louth, arising out of a prosecution brought by the town clerk of the Dundalk Urban District Council against a gentleman named Turner, the agent of Lord Roden. Substantially, the cause of the complaint was an alleged nuisance from the overflow from a river or stream, called the Rampart River, in the town of Dundalk, flooding the floors of the adjoining houses and causing danger or injury to the health of the inhabitants. At the hearing of the complaint, after the town clerk had been examined and cross-examined, the contention was raised, on behalf of the defendant, that the justices had no jurisdiction, inasmuch as the facts showed that there was a question as to whether the river was a sewer, and therefore vested in the urban council; and that this question being one of title, ousted the jurisdiction of the justices. The justices apparently yielded to that contention, and they have stated the case for the opinion of this Court as to whether they were right in so deciding. We are all agreed that they were not right. Where a so-called question of title is one which the justices must inevitably try if they are to discharge their functions, the plain inference is that Parliament intended to confer upon them jurisdiction to decide that question. At the very root of the investigation in this case the justices were bound to decide on two questions, namely—1, whether the river was or was not a sewer; and, 2, whether the defendant, as Lord Roden's agent, was an "owner" within the meaning of the Public Health Act. Inasmuch as the adjudication by the justices necessarily involved a decision on one or both of these questions, it seems impossible to hold that the defendant could say that a dispute as to whether he is or is not the "owner," or as to whether this river is or is not a sewer, raises a question of title, ousting jurisdiction. In our opinion, the principle on which such ouster is based cannot apply in cases where of necessity there must be a decision on the precise points before the justices can exercise their jurisdiction to convict or dismiss.

At the same time, it is obvious that the remedy sought in this case was not a very convenient one. The Rampart River flows

through part of the industrial portion of the town of Dundalk, and a number of cottages, places of industry, and other buildings apparently have facilities for discharging various substances into the stream. Whether, in fact, such discharge takes place or not will be, no doubt, one of the questions that will be discussed before the justices when the case goes back to them, and as to that or as to the merits we will say nothing; but, from the attitude taken up by the defendant, it is apparent that one of the most important questions for decision is: whether there has been, in fact, such a general user of this kind as would alter the character of the river and convert it into a sewer. Mr. Dickie appears to think that there would be also some controversy as to the ownership of the stream, but probably the justices will be able to satisfy themselves that, apart from the question of its being a sewer, the river is owned by Lord Roden. Another question arises which may give difficulty and cause perplexity, and that is, whether the facts alleged in the complaint amount to a nuisance within the class dealt with by the particular section of the Public Health Act under which the prosecution is brought. These are all large and difficult questions for decision, and in this particular case they arise as between, on the one hand, a prosperous town, and, on the other hand, a landowner of position and property; and it does not appear that the summary proceeding adopted will work with economy for either party. We are all of opinion that it would have been better for the parties, having regard to the issues involved and the large property at stake, to have had the matters finally disposed of by proceedings in the High Court. As to this, however, we cannot control or dictate to either of the parties, and are of opinion that in this present prosecution there were three matters on which the justices should decide, namely—1, whether the alleged nuisance is of the class aimed at by the section of the Public Health Act; 2, whether Lord Roden is in law and in fact the owner of the Rampart River; and, 3, whether, having regard to the use to which the river has been or may have been put, it is or is not now a sewer. Of course, if it is a sewer, it is vested in the council, and that body would be responsible for any nuisance resulting from flooding.

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—
Sir James
Campbell C.J.

We must, therefore, send back this case to the justices, with a
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K. B. Div. direction that their jurisdiction was not ousted by the alleged
1918. matter of law, and that they must hear and determine whether the
COMERFORD facts proved constitute a nuisance within the particular provisions
v. of the Public Health Act; whether the defendant, as Lord Roden's
TURNER. agent, is or is not the "owner" of the river within the same
Sir James statute; and whether the Rampart River has or has not become
Campbell C.J. a sewer.

The justices were placed in a position of difficulty; the question raised as to jurisdiction was not altogether definitely decided, and it was, perhaps, difficult for them to come to a conclusion upon it. While, of course, he could not consent as to the costs, Mr. Dickie has been able to say that he would leave the question of costs entirely at our discretion; and, accordingly, we remit the case to the justices with the above directions, each party to abide his own costs.

GIBSON and PIM JJ. concurred.

Solicitor for appellant: *James M'Court.*

Solicitor for respondent: *Arthur S. Coulter.*

C. N. K.

MICHAEL McNAMARA, PLAINTIFF, v. THE MOST NOBLE
ULICK BROWN, MARQUESS OF SLIGO (1).

K. B. T. v.

1917.

Nov. 13, 30.

Master and Servant—Tort—Servant firing at and killing poacher—Scope of employment.

Except, possibly, in cases of fraud, the tortious act of a servant cannot be within the scope of any implied authority, unless the act of the servant was one which the master might legally have done.

Where a servant is entrusted by his master with the doing of a certain class of acts, which, in an emergency involving personal danger, may give occasion for sudden action and prompt decision, the servant cannot make his master responsible for an act which the servant considered he was entitled to do by reason of facts which he, honestly but mistakenly, believed to exist, if the master in the supposed state of facts could not lawfully have done the same act.

C., employed by the defendant as a "watcher to prevent poaching," saw the plaintiff's son and two other men poaching his master's river with a net. C. ran towards them, and fired a revolver shot at about 85 yards from the poachers, and another from a distance of about 30 yards from them. The first shot was apparently fired in the air, and the second apparently hit the plaintiff's son, who in fact died as the result of a revolver wound received on the occasion. The defendant had not supplied C. with arms or ammunition, or money for the purchase of arms or ammunition. In an action under Lord Campbell's Act (9 & 10 Vict. c. 93) by the plaintiff, the judge directed in defendant's favour on the ground that there was no evidence that C., in firing the revolver, was acting within the scope of any authority as a servant of the defendant.

NEW TRIAL MOTION.

Motion on behalf of the plaintiff to set aside the verdict and judgment entered for the defendant at the trial, and for a new trial of the action on the ground of misdirection by the judge who heard the action.

The action was tried by Kenny J. and a special jury at the Connaught Summer Assizes, at Castlebar, on the 12th July, 1917 and was taken by the plaintiff under Lord Campbell's Act (9 & 10 Vict. c. 93), to recover damages for the loss of his son by the negligence of the defendant's servant.

(1) Before SIR JAMES CAMPBELL C.J., and MADDEN and DODD JJ.

K. B. Div.
1917.

M'NAMARA
v.
BROWN.

The plaintiff's son, John Macnamara, with two other men went out, on the night of the 20th July, 1916, to poach the Louisbeg River, the fishing rights of which belonged to the defendant. At 1 p.m. that night, Carr, an employee of the defendant, observed the three poachers at the river. They were engaged in stretching a net across a pool. The plaintiff's son and one of the poachers stood on the right bank, the other poacher being in the river. The companion of the plaintiff's son held one end of the net, and the man in the river the other. Carr, when he first observed the poachers, was about 300 yards away; he ran towards them, and then, about 85 yards away from them, he fired a revolver, as he alleged, in the air. According to the evidence of one of the poachers, Carr again fired his revolver when about 30 yards away from the three men, and after the first shot the plaintiff's son and his companion ran across the river from the right to the left bank. Carr stated to the police that he ran into the river after the first shot; that he then seized the net, one end of which was still being held by the man in the river; that he shouted to the man to let go, and, on his refusal, fired a shot in his direction, but not with the intention of shooting him. There was some controversy as to whether Carr fired a third shot, but it appeared that the second shot was the one which resulted in the fatal injuries to the plaintiff's son. Carr was indicted, and tried for manslaughter, but was acquitted. In his replies to interrogatories, the defendant stated that Carr was employed by him at a salary of £4, without allowances or privileges, as a "watcher to prevent poaching"; and that neither he, the defendant, nor any person on his behalf, had supplied Carr with arms or ammunition or with money to purchase arms or ammunition.

At the close of the plaintiff's case, defendant's counsel applied for a direction on the ground that there was no evidence to go to the jury that Carr, in firing the revolver, was acting within the scope of his authority as a "watcher." Kenny J. being of opinion that there was no such evidence, directed in the defendant's favour; and verdict and judgment were entered for the defendant. The plaintiff now moved to set aside the verdict and judgment on the ground of misdirection.

Denning K.C. (with him *Carson*), for the plaintiff:—

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1917.

The evidence is that Carr was employed by the defendant as a water bailiff to prevent poaching in the defendant's river. He found himself, while preventing poaching, opposed single-handed to three poachers at one o'clock at night. It was a question for the jury whether Carr acted reasonably in protection of his master's property in firing a revolver to frighten the poachers. He fired two or three shots at a distance from the men; it was for the jury to decide if that was a reasonable act.

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BROWN.

If a master puts his servant in a position to do a certain class of acts in the protection of property, the master impliedly authorizes the servant to do everything that is reasonable to protect the property. What is reasonable is, in every case, a jury question. If a servant does a criminal act, *prima facie* the master is not liable; but if the servant does one of the class of acts he is impliedly authorized to do, and does it so negligently that his action is criminal, the master may be liable: *Dyer v. Munday* (1). The principle is well stated by Holmes J. in *Barry v. Dublin United Tramways Co.* (2)—“Authority from the master can only be implied where the act is one which in a certain state of circumstances might have been legally done by the master himself.” That statement was adopted by Palles C.B. in *Kinsella v. Hamilton* (3). Here the act of firing to frighten was one which in circumstances the master might legally have done.

In *Lloyd v. Grace, Smith & Co.* (4) a master was held liable for the fraud of the servant, although that fraud was committed for the servant's benefit alone, and fraud is not what a master could legally bring about. In that case Lord Macnaghten (p. 733) adopts with approval the statement of law as to the liability of the master for the servant's torts which was made by Willes J. in *Barwick v. English Joint-Stock Bank* (5), in which Willes J. said that no sensible distinction could be drawn between the case of fraud and of any other tort. In *Dyer v. Munday* (1) the master was held liable for the servant's assault. That is a very strong case, for there what the servant did amounted to

(1) [1895] 1 Q. B. 742.

(2) 26 L. R. Ir. 150, at p. 156.

(3) 26 L. R. Ir. 681, at p. 689.

(4) [1912] A. C. 716.

(5) L. R. 2 Ex. 259, at p. 265.

K. B. Div. a criminal act. *Ormiston v. Great Western Railway Co.* (1) is distinguishable from *Poulton v. London South-Western Railway Co.* (2). In the former case the master could never have done the act; it was not one of the class of acts which the servant was put in the master's place to do.

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The risks of assaults and violence were incidental to Carr's occupation; it was not unreasonable for him to be armed or to use his revolver, and he was acquitted of criminal intent: *Anderson v. Balfour* (3).

Godfrey Fetherstonhaugh K.C. and *Price*, for the defendant:—

The leading case on the implied authority of the servant is the case of *Poulton v. London South-Western Railway Co.* (2), which was approved in *Ormiston v. Great Western Railway Co.* (1). A master cannot impliedly authorize a servant to do an act which in no circumstances could be lawful. The evidence here is distinct that Carr fired in the direction of the poachers; that was an unlawful act; it was an assault and a threat of death. Self-defence might raise different considerations: Palles C.B., in *Kinsella v. Hamilton* (4), at p. 689; but here there was no attack on Carr; the shots were not fired by him in self-defence. Carr's only duty was as a "watcher to prevent poaching," and he was empowered to warn people off and get their names and addresses. What he did do could never be within the implied scope of his authority. The fundamental principle is that stated by Palles C.B. in *Kinsella v. Hamilton* (4), namely, that the Act must be one which the master might legally have done. In *Kinsella v. Hamilton* (4) the landlord had authorized the seizure, but the Court held that he could not be held responsible for the use of firearms by the bailiffs, since he could not be deemed to have impliedly authorized the doing of what he could not legally do himself.

[CAMPBELL C.J. referred to *Smith v. North Metropolitan Tramways Co.* (5).]

(1) [1917] 1 K. B. 598.

(2) L. R. 2 Q. B. 534.

(3) [1910] 2 I. R. 497.

(4) 26 L. R. Ir. 681.

(5) 55 J. P. 630.

There it was part of the duty of the conductor to prevent people travelling without payment of fares, and the company could have put the person off the tram. The company were responsible for the wrongful way in which the conductor did what the company could have done. It cannot be the law that the master could be responsible for every outrageous act done by the servant on the master's account. *Lloyd v. Grace, Smith & Co.* (1) is distinguishable. There the servant was entrusted with certain duties, and acted fundamentally in his position as agent. The master was responsible for the servant's act, because, if honestly done, it was an act the master could do, and was the class of act which the servant was employed to perform.

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1917.

M'N CARA

v.

BROWN.

Carson, in reply.

Cur. adv. vult.

SIR JAMES CAMPBELL C.J. :—

This was an action under Lord Campbell's Act, in which the plaintiff claimed damages for the loss of his son through the negligence of the servant of the defendant. The material facts were that the deceased and two other men went out about 1 o'clock on the night of the 20th July last to poach the Louisbeg River, the fishing of which is the property of the defendant, the Marquess of Sligo. They were seen by a man named Carr, who at the time was in the employment of the Marquess of Sligo as a "watcher to prevent poaching in the river." The three poachers had a net with them; one of them held one end of the net on the right bank of the river, while a second waded into the river, holding the other end of the net, with the intention of stretching it in and across a pool, the third man, the deceased, standing at the time on the right bank, close to the other man. While so engaged Carr approached them from some stables, about 200 yards away, and when about 85 yards from the men he fired a shot from a revolver. In his statement to the police sergeant Carr alleged that he fired this first shot in the air to frighten the men. The deceased and the other men then crossed the river to the left bank. Carr then fired a second shot from a distance of about 35 yards, according to the

(1) [1912] A. C. 716.

K. B. Div. evidence of one of the other two men; but Carr's statement
 1917. was that he ran into the river and caught hold of the net, one
M'NAMARA end of which was still being held by one of the men, that he
v. shouted to them to let the net go, but, as he still clung to it, he
BROWN. fired the second shot in the direction of the man, but not with
 Sir James the intention of shooting him. Carr subsequently fired a third
 Campbell C.J. shot; but the evidence seemed to lead to the conclusion that it
 was the second shot that resulted in the killing of Macnamara.

Upon behalf of the plaintiff certain interrogatories, with the answers thereto of the defendant, were read and put in evidence, from which it appeared that Carr was employed by the defendant, at £4 a year, as "watcher to prevent poaching in the Louisbeg River," but that no arms or ammunition were supplied to Carr by or on behalf of the defendant, nor was any money paid by or on behalf of the defendant for the purchase of arms or ammunition for Carr. It was proved that Carr was indicted and tried for the manslaughter of Macnamara, but was acquitted.

At the close of the plaintiff's case counsel for the defendant asked for a direction, upon the ground that there was no evidence that Carr, in using the revolver as he did, was acting within the scope of his employment, and Kenny J. thereupon directed a verdict for the defendant, being of opinion that there was no evidence that Carr in firing the revolver was acting within the scope of his employment.

The plaintiff having moved for a new trial upon the ground of misdirection, the case has been fully argued before us. Counsel for the defendant relied upon a number of reported cases, of which *Poulton v. London South-Western Railway Co.* (1) is the leading example, as establishing the principle that an employer can never be held liable for an act done by his servant as within the scope of his employment, in the absence of express authority to do it, unless the act was one which the employer himself was legally entitled to do. In other words, that authority to do the act can never be implied in such circumstances, that the defendant would not have been entitled in law to use the revolver as Carr did, and, therefore, that his act in shooting

(1) L. R. 2 Q. B. 534.

Macnamara was not within the scope of his employment, nor done with the implied authority of his employer. Mr. Denning, upon the other hand, contended that as Carr was proved to have been employed as a watcher to prevent poaching, every act done by him, no matter how outrageous, or even criminal, if done for the purpose of preventing poaching, and not out of caprice, or for some malicious and indirect purpose of his own, was presumably within the scope of his employment, and that, accordingly, in the present case, no evidence from the defendant being offered to rebut or alter this presumption, there was evidence before the jury from which they could legitimately find that Carr was acting within the scope of his employment, and that, consequently, the judge was wrong in withdrawing the case from them. He put this proposition in an alternative form, in reliance upon the decision in *Goff v. Great Northern Railway Co.* (1), in these words:—"Where there is a necessity to have a person on the spot, whose duty it is to perform a certain class of acts, and to determine upon an emergency whether certain things shall or shall not be done, the fact that there is a person on the spot, who is acting as if he had express authority, is *prima facie* evidence of such authority."

This is undoubtedly a well settled and recognized principle of law as affecting the relations of master and servant, and an excellent definition of it will be found in the judgment of Wills J. in *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Co.* (2), which was not only adopted by the Exchequer Chamber on the appeal (3) in the same case, but has also been cited with judicial approval in many subsequent cases. He states it in these words:—"A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done, and consequently he is held answerable for the wrong of the person so entrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, provided that what was done was done, not from

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(1) 3 E. & E. 672. (2) L. R. 7 C. P. 415, at p. 420. (3) L. R. 8 C. P. 148.

K. B. Div. any caprice of the servant, but in the course of the employment.”
 1917. The judgment of Blackburn J., on appeal in the Exchequer
M'NAMARA Chamber, is to the same effect, and he points out that, as was
v. decided in *Seymour v. Greenwood* (1) and on appeal (2), the
BROWN. principle applies, however outrageous and improper may be the
 Sir James manner in which the act is done. A striking application of
 Campbell C.J. the same principle by the Court of Appeal in England will
 be found in the case of *Dyer v. Munday* (3), where the act
 was accompanied by trespass and assault. In that case Esher M.R.
 says that it is a question for the jury whether the servant did
 the acts in the discharge of the duty entrusted to him, and
 that excess in doing the act, even amounting to a criminal offence,
 is only evidence from which a jury might, if they thought fit,
 draw the inference that it was not done in furtherance of the
 master's business, or at all in the interests of the master.

Mr. Denning, in applying this principle to the facts of the
 present case, practically contended that Carr, being employed as
 “a watcher to prevent poaching,” was entrusted with the duty to
 perform a class of acts for that purpose, and even if, when con-
 fronted with this particular emergency, he committed an unlawful
 act or even a crime, he would still be acting within the scope of
 his authority, if the jury found he did the act for the purpose of
 discharging the duty of “a watcher to prevent poaching.”

This contention called for consideration and investigation, in
 view of its startling consequences, because it would necessarily
 involve an employer in civil liability for even the most reckless
 and desperate act that any caretaker of his master's house or
 other property might resort to or adopt for its protection. I have,
 therefore, made an exhaustive search through the reported deci-
 sions upon the point, and I am satisfied that the answer suggested
 by my brother Dodd in the course of the argument is correct,
 namely, that with the exception possibly of the case of the servant's
 fraud or dishonesty, the underlying and governing principle in all
 such cases is that the particular act done must, in order to justify
 the conclusion that it was done by the servant within the scope of
 his authority, be an act which the master, had he been in his servant's

(1) 6 H. & N. 359. (2) 7 H. & N. 355. (3) [1895] 1 Q. B. 742.

place, could himself lawfully have done. Further, that in no case, even when entrusted with the doing of a class of acts which may, as in the present case, give occasion (in positions of emergency involving grave danger to his personal safety) for sudden decision and prompt action, can the servant, in a mistaken but honest belief in the existence of a state of facts which he considers entitle him to take a certain step, make his employer liable, if the employer himself, when the state of facts did in fact exist, could not lawfully have performed the same act. The fallacy in Mr. Denning's argument lies in his treating the act done in the present case as the prevention of poaching, whereas in truth it is the firing at or in the direction of the poacher.

The principle I am endeavouring to expound will be found to be stated in concise and suitable terms by O'Brien J. in the case, in this court, of *Barry v. Dublin United Tramways Company* (1), in the following words:—"When the nature of the duty that the servant has to perform is such as to require immediate action for the effectual performance of that duty, the law considers the servant to be necessarily invested with authority to determine whether the conditions of such action exist. Where the duty is such as to require such action and he makes a mistake in supposing the conditions exist, when they do not in fact, the employer is liable. But all questions of the kind are still subject to the governing rule that, whatever the nature of the duties, the servant can have no authority to do what the employer could not do himself." There are undoubtedly dicta in some of the cases which, in rather loose language, state the principle to be that a master is liable for any tort of the servant, if committed upon the master's account, and in the honest but mistaken belief that he was entitled to do the particular act in discharge of the duties entrusted to him, and the existence of dicta to this effect explains the element of doubt with which the principle is stated in Pollock on Torts, 12th ed., p. 95, in the following terms:—"A master may be liable even for wilful and deliberate wrongs committed by the servant, provided they be done for the master's account and for his purposes, and (it would seem) are of a kind that might, in some circumstances,

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(1) 26 L. R. Ir. 150.

K. B. Dir. be within the lawful scope of the employment." But, as I have
 1917.
M'NAMARA already pointed out, this latter consideration can never be dis-
v. regarded, as without it the proposition in question would expose
BROWN. an employer to unlimited liability for any act of wilful or outrageous
 misconduct on the part of a servant, provided only that it was found
 by a jury to have been committed in the service and on account of
 the employer. A caretaker entrusted with the protection of an
 orchard, or a night watchman placed in charge of his employer's
 business premises, who, in a moment of panic, fired at and killed
 or wounded one or more innocent callers or passers-by, would, upon
 this assumption of implied authority, involve his employer in a
 liability for very serious and substantial damages, so that reason
 and common sense would seem to require that any such proposi-
 tion should be limited to cases in which the employer himself
 could lawfully have acted as his servant did.

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It was further contended on behalf of the plaintiff that even though the defendant had not entrusted Carr with firearms or authorized the use of them by him, still it was a reasonable precaution on the part of Carr, having regard to the dangers incident to his employment, to carry a revolver for the purpose of self-defence. If, in the circumstances of this case, the revolver had been fired by Carr in the belief, however mistaken, that his life was in danger, an interesting question as to the liability of his employer would have arisen, though, even in such a case, it was the opinion of Palles C.B., in *Kinsella v. Hamilton* (1), that the act of shooting was not done by the servant in the discharge of his duty to his employer but merely in self-defence, and was, therefore, not within the scope of his employment. I confess that I am not altogether convinced by this reasoning, but the question is out of this case, as the evidence is wholly inconsistent with the theory that Carr fired the revolver in any sense in self-defence.

Finally, Mr. Denning has relied strongly upon a passage in the judgment of Willes J. in the well-known case of *Barwick v. English Joint-Stock Bank* (2), as an authority for the proposition that a principal is liable for any tort of his agent when acting in the course of his business. In that case the plaintiff sued the

(1) 26 L. R. Ir. 671.

(2) I. R. 2 Ex. 259.

defendants for damages for fraudulent representation of their manager. At the trial Martin B. non-suited the plaintiff; but this decision was set aside upon appeal in the Exchequer Chamber, and a new trial granted. The judgment of an unanimous Court was delivered by Willes J., who, in the course of it, used the following words, upon which reliance has been placed by Mr. Denning :—" But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is that the master is answerable for any such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle has been held applicable to actions of false imprisonment, in cases where officers of railway companies, entrusted with the execution of laws relating to imprisonment and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws." It is impossible to suppose that such a learned and experienced judge had not present to his mind, when giving this illustration, the underlying principle of all such decisions—that the particular act done by the servant was one which the master was by law himself empowered to do, more especially in view of his own previous judgment in *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Co.* (1). In the subsequent case of *Lloyd v. Grace, Smith & Co.* (2), in which damages were claimed against the defendants for the fraudulent conduct of their managing clerk, which his employers had never authorized, and of which they had no knowledge, and from which they had received no benefit, the House of Lords, overruling the decision of the Court of Appeal, held the defendants liable, and expressly approved of and adopted the decision in *Barwick's Case* (3), and treated it as an illustration of a settled principle of law that a principal is responsible for the fraud of his agent, committed by him in the course of his employment, whether for the benefit of the principal or merely for the benefit of the agent himself. It

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(1) L. R. 7 C. P. 420. (2) [1912] A. C. 716. (3) L. R. 2 Ex. 259.

K. B. Div. seems to me undoubted that this decision of the House of Lords
 1917. was based upon the assumption that the clerk in that case, in
M'NAMARA fraudulently converting the property of a client of his employers,
v. though without their authority or knowledge, was acting within the
BROWN. scope of his authority; and Lord Maenaghten, in his judgment,
 Sir James quotes with approval the following passage from the judgment
 Campbell C.J. of Sir Montague Smith in the case of *Mackay v. Commercial Bank of New Brunswick* (1), in which he cites the proposition as to the liability of a principal for the fraud of his agent given in *Berwick's Case* (2) by Willes J. in the following words:—"In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

Mr. Denning has, accordingly, contended that, as a result of the decisions in these cases and the reasoning upon which the judgments are based, it is now the law that an act done by the servant, without the express authority of his master, may be within the scope of his employment, and his master be, therefore, liable for it, even though the act itself is criminal or fraudulent, and, therefore, such an act as could not lawfully be performed by anyone. It is certainly remarkable that if these cases were intended to decide such a general proposition, no reference should be found in any of the judgments to what was decided in so many previous cases to be the governing principle qualifying the liability of a master for a tortious act done by his servant, namely, that it must be an act which, under some given state of facts, the master himself could lawfully do. At the furthest, these cases can only be read as establishing that the case of fraud is an exception to the general rule, and that a principal may be liable for the fraud of his agent in the course of the business entrusted to him by his principal. A closer examination, however, will establish the proposition upon which Lord Halsbury based his judgment, which was laid down by Holt C.J. in *Hern v. Nichols* (3), "that a

(1) 5 P. C. 394.

(2) L. R. 2 Ex. 259, at p. 266.

(3) 1 Salk. 289.

principal is responsible for the fraud of his agent, though not criminaliter yet civiliter, for, seeing somebody must be a loser by this deceit, it is more reason that he who employs and puts a trust and confidence in the deceiver should be a loser than a stranger." The remaining judgments proceed upon the basis that the principal, having put the agent to be, as it were, his alter ego, to discharge certain duties in his place and on his behalf, is liable for the fraud of such agent, when committed by him in the course of or in the discharge of such duties; or, in other words, that the fraud of such agent when committed in such circumstances as were found to exist in the cases of *Barwick v. English Joint-Stock Bank* (1) and *Lloyd v. Grace, Smith & Co.* (2) must be held to have been committed by the agent within the scope of his employment. No reference was made in the course of the arguments to, nor was any reliance placed upon, certain provisions in the Fishery Laws which would seem to entitle a person in the position of Carr to have seized the net and to arrest the poachers upon their failure or refusal to give their names and addresses; but even if these provisions did apply to the case of his particular employment, they would not entitle him, in the circumstances of this case, to discharge a loaded revolver at or in the direction of the poachers.

This case may well be carried to a higher Court for a further consideration of the important questions which it involves; but we must hold that, as in our view of the law the defendant himself could not lawfully have used a revolver in the circumstances, there was no evidence proper to be submitted to a jury that Carr, in acting as he did, was acting within the scope of his employment. We, accordingly, dismiss this application, and with costs.

Solicitor for the plaintiff: *Henry T. M'Ternan.*

Solicitor for the defendant: *John Garvey.*

C. N. K.

(1) L. R. 2 Ex. 259.

(2) [1912] A. C. 716.

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Appeal.
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NEWELL v. STARKIE (No. 2) (1).

Jan. 14, 15. *Practice — Costs — Taxation — Public Authorities Protection Act, 1893 — Solicitor and client — Costs payable by opposite party — Retainer to counsel — Consultation prior to new trial motion — Order 65, rule 65 (28), (29).*

A retainer to senior counsel prior to the trial is in a proper case taxable against a party liable to pay costs as between solicitor and client under the Public Authorities Protection Act, 1893 (56 & 57 Viet. c. 61).

Costs of a consultation to settle the defendant's affidavit of discovery of documents were also in the special circumstances allowed as between solicitor and client as against the plaintiff.

Costs of a consultation prior to a new trial motion, being taxable as between party and party, were allowed by the Court of Appeal, reversing the King's Bench Division.

Brandon & Co. v. Hannu (41 Ir. L. T. R. 75) approved.

Appeal and Cross Appeal from an order of the King's Bench Division, reviewing the taxation of the bill of costs in the action.

The principal matters in dispute, and in reference to which alone this case is reported, were the allowance of (a) a retainer prior to the trial to senior counsel for the defendant; (b) fees for consultation on the settlement of the defendant's affidavit of discovery of documents; (c) fees for consultation prior to a new trial motion.

In the action of *Newell v. Starkie* (2) the plaintiff, a former Inspector of National Schools, claimed against the defendant, the Resident Commissioner of National Education, damages for maliciously procuring and conspiring with others to procure the infliction on the plaintiff of alleged wrongs, whereby his position and salary were prejudicially affected, and which finally resulted in his enforced retirement. The action, not having been commenced within six months after the commission of the acts complained of, the defendant, in addition to traverses, relied upon the Public Authorities Protection Act, 1893; and, at the close of the

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

(2) [1917] 2 I. R. 73.

plaintiff's case, asked for a direction on the grounds, amongst others, 1, that no evidence had been adduced in support of the contention that the defendant had procured the infringement of any rights of the plaintiff under his contract of service, and, 2, delay in bringing the action, which entitled the defendant to rely upon the Public Authorities Protection Act, 1893. Mr. Justice Kenny directed in favour of the defendant on the foregoing grounds. At the trial a great many documents relating to the career of the plaintiff as inspector for a period of over twenty years were put in evidence on his behalf.

The plaintiff moved for a new trial. The King's Bench Division held that the Commissioners of National Education were a public authority; that the defendant, as Resident Commissioner, had public duties to perform, and that in action by a subordinate for torts alleged to have been committed by him in carrying out these duties he was entitled to rely upon the protection afforded by the Public Authorities Protection Act, 1893. This decision was affirmed by the Court of Appeal. It was admitted, assuming the correctness of the decision, that the costs were taxable, as between solicitor and client on the principle applicable where such costs are payable by a third party. The Taxing Master, in his report, stated he had acted on this principle, and had, according to the best exercise of his judgment and discretion, allowed all items of charges except such as were of an unusual character, and which could not properly be demanded by solicitors against their own client without the client's special authority or agreement in writing.

Appeal.

1918.

NEWELL

v.

STANLEY.

Dickie K.C. and Moonan, for the plaintiff:—

Neither the retainer to counsel for the defendant, nor the fee for the consultations to settle the affidavit of discovery and prior to the new trial motion, was taxable as against the plaintiff.

Pigot K.C. and T. H. Maxwell, for the defendant:—

As between party and party fees for consultation prior to a new trial motion are allowable: *Brandon & Co. v. Hanna* (1).

(1) 41 I. L. T. R. 75.

Appeal.
1918.

NEWELL
v.

STARKIE.

The consultations were necessary and proper, and in particular the consultation upon the settlement of the defendant's affidavit of discovery was essential to the proper conduct of the defendant's case.

The Court affirmed the order of the King's Bench Division, allowing the retainer to defendant's counsel, and the consultation on settlement of the affidavit of discovery. Reversing the order of the Court below, they allowed the fees for the consultation for the new trial motion, such fees being taxable as between party and party.

Solicitors for the plaintiff: *Sainsbury & Co.*

Solicitor for the defendant: *John M. Maxwell.*

C. L.

IRISH LAND COMMISSION *v.* FORDE AND ANOTHER (1). *K. B. Div.*
(1916. No. 6553.)

1917.

April 24.

Landlord and tenant—Estate purchased by Irish Land Commission—Tenant failing to sign undertaking to purchase his holding—Non-payment of rent—Remedy—Irish Land Commission as landlords—Powers—Irish Land Act, 1903 (3 Ed. 7, c. 37), sects. 6, 18, and 19.

Appeal.

Dec. 18, 19,
20.

Where the Land Commission acquire an estate under sect. 6 of the Irish Land Act, 1903, they may, exercising the powers of landlords, proceed against a tenant who has failed to sign an undertaking to purchase his holding by way of ejectment for non-payment of rent.

MOTION to set aside the judgment entered for the plaintiff by Gordon J.

The question for decision was whether the Irish Land Commission as owners of an estate acquired under sect. 6 of the Irish Land Act, 1903, could maintain ejectment for non-payment of rent in respect of a holding not the subject of a purchase agreement.

The following statement of facts is taken from the judgment of Gibson J. in the King's Bench:—

“Lord Westmeath having delivered an originating request under sect. 6 of the Land Act of 1903 by proposal, dated the 3rd September, 1913, the Commission offered to buy subject (*inter alia*) to tenant's interests. The untenanted land was 914A. 1R. 9P. The second schedule deals with tenanted lands; the price of the reversion on each holding was separately calculated; that for the holding of defendants was £960, and the annuity payable by the tenant was to be £31 4s. The lands were described as held under judicial tenancy of the 12th July, 1907. Certain reservations were to be inserted in the tenant's undertakings. By order, dated the 21st March, 1914, the Commission fixed March 18th, 1914, as the date on which they agreed to purchase, and the 18th March, 1915, was appointed as the closing day. The defendants, who were trustees, for minors, of a holding

(1) Before GIBSON and DODD JJ.

K. B. Dir. on Lord Westmeath's estate, had failed to sign an undertaking, and, with Lord Westmeath's consent, the purchase-money had accordingly been reduced. On April 7th, 1914, this holding was included, and on April 9th, 1914, a vesting order of the entire estate was made pursuant to sect. 16 of the Land Act of 1903. If there was an undertaking by the tenant here, there was apparently no subsequent contract now capable of enforcement. Lord Westmeath's estate is absolutely vested in the Commission, who prima facie, unless disabled by statute, enjoy the rights he possessed. The ejectment is based on non-payment of three years' rent, £132 15s., and there is a certificate by the Commission showing £110 12s. 1d. as due. As practically the whole of the first year's rent, due on May 1st, 1914, accrued before the vesting order of 9th April, 1914, Mr. Wylie, to avoid any possible objection, consented that the rent supporting the judgment should be confined to the two last years, without prejudice to the right of the Commission to recover payment of the first year's. The point was suggested by the Court, and was not adverted to by counsel at the trial or in argument before us.

Jellett K.C., Pigot K.C., and Hugh Kennedy, for the defendants :—

In this case the property was dealt with by originating request under sect. 6 of the Land Act of 1903. The relation of landlord and tenant did not exist between the Land Commission and the defendants from the date at which the Land Commission became owners. The Land Commission are relying upon the provisions of Deasy's Act, but it is not incorporated in the Land Purchase code. Under the Land Act of 1870, Part 3, the Board of Works was only a conduit pipe to pass the estate from landlord to tenant. They are not given any power to recover rent. The Act of 1881 substituted the Land Commission for the Board of Works, and gave them similar powers.

It is suggested on the part of the Land Commission that their powers begin at the date of the agreement to purchase, and cease on the land being vested; but the powers given to the Land Commission are wholly inconsistent with those of an ordinary landlord. Parliament could have made the Land Commission

landlords, as it did the Congested Districts Board, but it refrained from doing so. There is a great difference between the recovery of rent by the Land Commission and by the Congested Districts Board. If the plaintiffs' contention were right, all the special powers given to the Congested Districts Board would be unnecessary. The plaintiffs are seeking to perpetuate landlordism, which the Act was passed to abolish. The plaintiffs are confined to the remedy given them by the statute: see *Attorney-General v. Great Eastern Railway* (1); *Baroness Wenlock v. River Dee Co.* (2); *R. v. County Court Judge of Essex and Clarke* (3); *Wolverhampton New Waterworks Co. v. Hawkesford* (4). The Land Commission and the defendants stand in the relation to one another of trustee and cestui que trust, and a trustee will not be permitted to eject his cestui que trust for non-payment of rent. The plaintiffs being a statutory corporation have only limited powers, and cannot enforce remedies other than those specifically given or necessarily to be inferred; and ejectment for non-payment of rent is not included in such remedies.

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Wylie K.C. and *Babington*, for the plaintiffs:—

When a vesting order is made in the case of a purchase by the Land Commission under sect. 6 of the Irish Land Act, 1903, the Land Commission become landlords of the estate and acquire all the rights which pass with the reversion. It is suggested that sect. 18 of the Act of 1903 and the other sections relied on by the defendants show that this is not so, and that they have no rights but those to be found in the code; but, on examination, this argument is answered by the code itself.

The Bright clauses of the Act of 1870 first provided for the purchase by tenant farmers of their holdings by means of money advanced by State through the Board of Works, the repayment of which was secured by an annuity recoverable in the same way as tithe rentcharge (sects. 44-48, and 49). The Land Commission were then established by sects. 41, 42 of the Act of 1881, the powers of the Board of Works were transferred to them (sect. 35), and they were given power to purchase estates

(1) 5 A. C. 473, per Lord Blackburn, at p. 481.

(2) 10 A. C. 354, at p. 362.

(3) 18 Q. B. D. 638.

(4) 6 C. B. (N. S.) 336, at p. 356.

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en bloc for the purpose of selling them to the occupying tenants (sect. 26). The Land Commission under sect. 26 had to be satisfied that three-fourths of the tenants paying two-thirds of the total rental were willing and able to re-purchase from them before they purchased the estate. The sale to the Land Commission under sect. 26 was carried out by conveyance. They had no rights until conveyance, and by the conveyance the reversion in fee passed to them with all its rights and interests, including the right to eject for non-payment of rent. They are, in fact, landlords for all purposes, subject to their statutory duty to re-sell. But they had no power to compel an unwilling tenant to buy, and if one of the unwilling tenants refused to buy, they had no remedy whatever unless they could eject him for non-payment of rent.

On a re-sale by the Land Commission to a tenant direct, the purchase-money was advanced by them, and repayable by an annuity recoverable in the same manner as the annuity under the Act of 1870. But in the case of an unwilling tenant there was no annuity. His rent continued the same until the annuity began. The statutory remedy only applied to the annuity, and what the defendants have failed to show is how the rent pending the re-sale was to be recovered unless the ordinary rights of the landlord passed to the Land Commission. It is moreover clear that the Land Commission rights are not limited to those to be found in the code, because the purchase-money includes untenanted land of which they can make lettings: *Wallace's Estate* (1). And it has not been suggested that they cannot eject such tenants for non-payment of rent.

Now, as to the construction to be placed on sect. 18 of the Act of 1903. On sales to tenants, a vesting order was substituted for conveyance by sect. 8 of the Act of 1885, and a fiat for the vesting order by sect. 32 of the Act of 1896; and by sect. 35, sub-s. 2, of that Act interest on the purchase-money was made payable by the tenant from the date of the agreement for purchase until the annuity begins to run, recoverable as an instalment of the purchase-annuity, and, if the sale goes off, to be allowed to the tenant as a

payment on account of rent. This applies to re-sales by the Land Commission of lands bought by them under sect. 6 of the Act of 1903 (see sect. 18, sub-sect. 3, of that Act). This shows that rent does not cease upon purchase of the reversion by the Land Commission, though in practice it becomes interest in lieu of rent from the date at which the tenant signs an undertaking to purchase, with the liability to revert if the sale falls through. If no undertaking is signed, the rent continues to accrue. Sect. 18 of the Act of 1903 only applies to the rents and profits of lands agreed to be purchased by the Land Commission, that is, to the period between the signing of the agreement for sale by the landlord and the vesting of the landlord's interest in the Land Commission. This is an entirely new provision concerning a new period. Before the Act of 1903 the rent was payable to the landlord until conveyance; now the interest in lieu thereof is payable to the Land Commission from the date of the agreement for sale. Sect. 18 had no wider application than to provide for this new arrangement, and it was not intended to take away rights the Land Commission already had. Once the vesting order is made, vesting the landlord's interest in the Land Commission, sect. 18 ceases to apply, and the Land Commission are in the same position as under sect. 26 of the Act of 1881, that is, they are landlords of the estate. Even if sect. 18 does apply after vesting order, it only gives an additional remedy, and the Land Commission can pursue either the statutory remedy or the common law remedy: *The Wolverhampton New Waterworks Co. v. Hawkesford* (1).

Sect. 16 of the Act of 1903 shows that the fee-simple is vested in the Land Commission, and under sub-s. 3 of that section they are actually registered as absolute owners under the Local Registration of Title (Ireland) Act, 1891. Sect. 56 of the Act of 1909 has no application. That section makes the Congested Districts Board landlords from the date of the agreement for purchase, which we do not contend for here.

Cur. adv. vult.

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(1) 6 C. B. (N. S.), at p. 356.

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The question before us is whether the Land Commission as owners of an estate acquired under sect. 6 of the Act of 1903 (3 Edw. 7, c. 37), can maintain ejectment for non-payment of rent in respect of a holding not the subject of a purchase agreement, it being conceded that no such ejectment would lie against a tenant who had agreed to buy. It was faintly suggested by Mr. Jellett in his opening that the sale by the Land Commission having contemplated such agreement by the tenant, a contract of purchase by the tenant should be inferred from the various documents entered on behalf of the plaintiffs. Mr. Pigot in reply did not repeat the suggestion. Having regard to the defence and counter-claim (withdrawn at the trial by defendants' counsel), and the absence of any documentary or other proof of any purchase contract, we must take the ruling of my brother Gordon, that there was no purchase by the tenant, to have been correct. Though unquestionably the Land Commission bought on the assumption that the holding was to be sold, there was not on the evidence any contractual obligation disclosed binding the tenant to purchase; nor was there anything to show that such contract, if it ever existed, was unbroken and capable of being enforced by specific performance; nor was there any duty on the Land Commission to compel purchase under sect. 19 of the statute of 1903, c. 37 (borrowed from sect. 40, sub-s. 1 (*d*), of the Act of 1896, c. 47, and extended to the Congested Districts Board by sect. 54 of the statute of 1909, c. 42). The Commission have a discretion as to exercising such compulsory power which this Court has no jurisdiction to overrule. In the present case they have decided not to apply sect. 19.

The facts are few and simple, all controversial matters arising on the defence and counter-claim having been removed. [His Lordship stated the facts as set out above, and proceeded :—

The defendants' counsel contend that—1. The purchase being for a specific purpose, re-sale to the tenants (including the defendants), they are trustees and cannot bring ejectment. 2. That the Commission as a statutory corporation with limited powers cannot enforce remedies other than those specifically given or necessarily to be inferred, and that ejectment is not included in such remedies.

3. That the Act, 1903, c. 37, sect. 18, prescribes a remedy which is exclusive, and is inconsistent with ejectment. 4. That the Congested Districts legislation conclusively proves that the Commission were not to enjoy the rights of landlords as to ejectment. I need not waste time on the first point, which was indicated rather than argued. The estate is indefeasibly vested in the Commission, who are not trustees for a tenant who, contrary to their expectation, declines or neglects to carry out his purchase.

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Before discussing the other topics raised, I shall say something on the position of the Commission in its general aspect. They are incorporated for a great public purpose with judicial powers and extensive administrative capacity subject to the control and supervision of the Treasury and Parliament. They are very unlike the limited companies and railways, the subject of the decisions cited at the Bar, where certain operations were held to be outside the authorized objects of the company. Here the question is whether the estate lawfully acquired is, while it remains unsold, deprived of an incidental remedy available in the hands of the former owner, and in the hands of a purchaser of the reversion, if the Commission sold to such purchaser. The question is one not of giving a remedy, but of taking away a remedy incidental to ownership and necessary for utilizing the property bought, with as little risk of loss as possible. The Commission make the best estimate they can as to re-sale and the safety of the purchase, but they are not infallible, and if the result falsifies their expectations, they are accountable only to Parliament and the Treasury. While the estate purchased continues vested in them, they can do everything reasonably incidental to their main purpose, against which incidental matters no prohibition is found: *Small v. Smith* (1); *Attorney-General v. Mersey Railway Co.* (2). As owners pending re-sale the Commission are under a duty to the State to protect the property purchased and to make it productive. They could clearly eject a person wrongfully invading such property, and restrain waste committed by anyone. They could make a temporary letting of unoccupied land, and parcels not purchased by tenants may be sold subject to a fee-farm rent, in both of which cases the

(1) 10 App. C., at p. 129, per Lord Selborne. (2) [1907] A. C. 415, at p. 419.

K. B. Div. Commission would necessarily as landlords be able, unless prohibited, to use the remedy of ejectment; the Commission are not described as landlords because their chief function is not to hold land, but to re-sell it to a particular class.

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The holding before us is held under a judicial tenancy, governed by sect. 5 of the Act of 1881. Have not the plaintiffs, *prima facie*, the rights thereby given to the landlord? As my brother Dodd pointed out, a tenant entitled to apply for, or get a renewal of, a judicial tenancy at a reduced rent, could not have that right suspended during the period that the estate remained unsold. Could he not proceed against the Commission in their character of landlords as owners of the reversion? It is not disputed that the judicial tenancy is in full force and unaffected by the transfer of Lord Westmeath's estate. It would seem improbable that Parliament should allow the tenant all the privileges attached to his holding, yet deprive the Commission, representing the landlord's estate, of the ability to enforce rent, payment of which is an essential condition of the statutory tenancy. How can the Commission have the status of landlords for the purpose of meeting and considering a tenant's claim to have his rent reduced, and lose it when they come to enforce reciprocal remedies? Unless precluded by express language or necessary implication, they must be able to resort to all remedies attached to ownership. It would be their duty in the interest of public finance to do everything necessary to avoid loss, and to make the property while held by them profitable, whether the land is unlet, or occupied by a tenant who will not pay his rent and neglects to purchase.

It is contended that capacity to maintain ejectment is negatived—1, by the legislation antecedent to 1903, which (it is said) impliedly shows that the Commission were not to possess landlords' rights and remedies; 2, expressly, by the statute of 1903, which prescribes a remedy excluding ejectment; 3, by the Congested Districts Board statutes which (it is urged) demonstrate that the Commission did not possess the status of landlords. I take these points in order.

I cannot find anything in the legislation previous to 1903 which by implication would exclude ejectment. The principal

provisions are those contained in the statutes of 1881, sects. 26, 27, and 34, and the statute of 1885 (48 & 49 Vict. c. 73), sects. 5 and 7. *K. B. Div.*
 The situation where a tenant declines to buy, or, having agreed, then withdraws, is not dealt with. In such cases, are the Commission, 1917.
 pending re-sale, deprived of all remedy? Mr. Jellett says no. IRISH LAND
 First, they can sell to anyone who will buy the reversion; secondly, COMMISSION
 they can get an order for possession under sect. 25 of the Act, 1891 v.
 (54 & 55 Vict. c. 48). The suggested remedies would be inapplicable FORDE.
 or useless. A sale to a third person would only transfer to such Gibson J.
 purchaser the recalcitrant tenant; it would put over him a new
 small landlord (which was never contemplated as a normal step); it
 would not get in the unpaid rent; and if no sale at a reasonable
 price could be effected (a possible and not improbable result with
 such a non-paying occupier), the Commission would have the
 holding left unproductive on their hands. The defendants' argu-
 ment was directed only to ejectment for non-payment. Could it
 be contended that the Commission could not sue for the rent
 accrued while they had the reversion? If they could sue, they
 could get judgment and sell under *fi. fa.*, a much more drastic
 method of expropriation than ejectment with right of redemption
 on payment of two years' rent.

The right to an order for possession under sect. 25 of the Act of 1891 only applies where the Commission are entitled to sell for non-payment of any sum due to them. The section is quite inapplicable to non-payment of rent by a non-purchasing tenant against whom there was at that date no right of sale.

It would require clear language to justify the conclusion that the Commission as owners of the reversion are not to be entitled to all rights and remedies belonging to that reversion. There is no such language, and I am of opinion that up to 1903 the plaintiffs would have been entitled to maintain an ejectment for non-payment of rent, and sue for the rent as a contract debt.

The enactment mainly relied on was the statute of 1903, under sect. 6 of which the estate was acquired. Sect. 18 (it was urged) created a specific remedy in respect of rent due by a tenant, which excluded ejectment. In construing it we must bear in mind the previous state of the law, and sect. 35 of the Act of 1896. Sect. 6 enables the Commission to buy if a certain

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number of tenants undertake to purchase, subject to a dispensing power in the Lord Lieutenant. Some of the land purchased might be untenanted; some held by tenants unwilling to buy; some occupied by tenants who might not carry out their undertakings. Sect. 18 comprises three subject-matters. The first is "rents and profits" of any land agreed to be purchased by the Commission. These rents and profits are contemplated as accruing after the agreement. The Commission are treated as inchoate owners in possession. Suppose that, pending re-sale, they let untenanted land, would that contract rent be within "rents and profits"? Is the rent spoken of confined to rent under a tenancy existing at the date of the agreement? What does "profits" mean as distinct from "rent"? The second subject-matter is interest under sect. 35 of the Act of 1896 (that would be in the case of purchasing tenants), which interest is here fixed at $3\frac{1}{2}$ per cent. The third subject-matter is, subject to the provisions of the section, any arrears of rent due at the date of the purchase-agreement and not remitted. All these three classes of items were to be payable to, and recoverable by, the Commission in like manner as if they were (what certainly they were not in fact) instalments of purchase annuities charged upon holdings. The object of the section was to give on the one hand to the Commission a right which before vesting they would not have possessed, and, on the other, to confer limited protection on tenants who had undertaken to buy, and possibly on tenants who might be expected to come in as buyers. The way in which the $3\frac{1}{2}$ per cent. interest and sect. 35 are referred to would suggest that purchasing tenants were the chief, if not sole, objects of the section. The proviso as to what is to happen if the sale is not completed by the Commission points to the enactment being confined to the period before vesting, during which the Commission are given new but restricted rights, and the tenants enjoy restricted protection. I am unable to read the section as taking from the Commission (after acquiring complete ownership) the right of compelling a non-purchasing tenant to pay his rent by ejectment or other action. If they had that right before 1903 sect. 18 does not abolish it. The enactment is not at all clear, and it may be that it does not extend to non-purchasing tenants,

or to tenants taking under new lettings. Assuming, however, *K. B. Dir.* that such tenants are included, the section only regulates rela- 1917.
tions during the interval before vesting. Such relations are *IRISH LAND*
made subject to new rights, remedies, and liabilities. *COMMISSION*

Defendants' final argument was based on the statutes relating to the Congested Districts Board, particularly 1893 (56 & 57 Vict. c. 35), sect. 2; 1901 (1 Edw. 7, c. 34), sect. 2; and 1909 (9 Edw. 7, c. 42), sects. 54 and 56. These (they urged) established that the Commission were not landlords, and did not possess the remedies enjoyed by landlords, though tenancy depends on contract, and such contract remains in full force, modified here by the fair rent order. The Act of 1893, sect. 2, enables the Board to acquire land, and declares that they shall be landlords of such land within the meaning of the Purchase Acts of 1870 to 1891. Observe the date of the statute. In 1893, as I have already stated, the Commission, until re-sale, had all rights enjoyed by the reversioner's estate, could create temporary tenancies, and in certain cases make fee-farm grants. Sect. 2, dealing with the Board, does not purport to displace such rights in the Commission. Mr. Wylie contended that the Board were expressly invested with the status of landlords for the purpose of dealing as purchasers with the Commission; and he says that such purchases by the Board were not uncommon (see *Taffe's Estate* (1)). The point was not dealt with by defendants' counsel. The statute must be construed as at the date when it was passed. If Mr. Wylie's view is correct, it explains the frame of sect. 2, and deprives defendants' argument, founded upon it, of any weight. Further, apart from Mr. Wylie's interpretation, the function of the Commission was not at all like that of the Board. The Commission, after buying, were to re-sell as soon as they could. For the comparatively brief period, in the view of Parliament, during which the property would usually remain in their ownership, it would be quite unnecessary to describe them as landlords—in their case an inconvenient and misleading designation. The duties of the Board, on the other hand, involved continuous adjustment, management, and dealings with holdings and tenants, of a character usually performed by

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K. B. Dw. landlords in their management of an estate, and might require 1917. protracted negotiation. It might, therefore, have been deemed desirable to use the familiar description "landlords," which would convey to all the existence of such continuous superintending authority. Again (still assuming Mr. Wylie's explanation to be inadmissible), the reference to landlords may have been intended (on account of the peculiar functions of the Board) to remove a possible misconception. It may have been introduced *ex abundanti cautela* and unnecessarily. There are many examples of this. One of the last is in sect. 17, sub-s. 3, of the Act of 1896 (59 & 60 Vict. c. 47), enacting that agreements thereunder when filed shall have the same effect as if the matters agreed on had been determined by the Commission. There is no such provision as to agreements filed under sect. 8, sub-s. 6, of the Act of 1881; and hence it was argued that such agreements stood in a wholly different position from judicial tenancies proper. In *O'Connor v. O'Connor* (1) it was held that such agreements had the same effect as if there had been a Court order. The use of the name "landlords" does not alter the reality of things. In sect. 2 of the Act of 1893 the description of the Board does not repeal or reduce the remedies of the Commission. Banks or insurance companies holding land as mortgagees or otherwise are not usually spoken of as landlords, but they enjoy all rights attached to ownership.

A statute does not necessarily alter the law even by showing an erroneous opinion of it (Craies on Statutes, 1911, pp. 449-50). Thus compare 4 & 5 Vict. c. 48, sect. 1, with *Jones v. Mersey Docks and Harbour Board* (2). There are many cases illustrating this, such as *Ex parte Martin* (3) and *Attorney-General v. Duke of Richmond* (4). I do not, however, think that the statutes as to the Board indicate any misconception as to the position and powers of the Commission. Sect. 2 of the Act, 1901, c. 34, does not help the defendants. It confers on the Board a right of resumption against holdings not the subject of a statutory term, and therefore outside the Act of 1881. Whether the Commission would possess such power even in the case of judicial tenancies is a matter which it is unnecessary to consider.

(1) [1916] 2 I. R. 148.

(2) 11 H. L. C. 443.

(3) 6 B. & C. 80, at p. 83.

(4) [1907] 2 K. B. 923, at p. 981.

The last enactment requiring notice is the statute of 1909 (1 Edw. 7, c. 42). Sect. 54 invests the Board with the same discretionary power of compulsion as sect. 19 of the Act of 1903 gives the Commission. Sect. 56 invites more attention. It applies sect. 18 of the Act of 1903 to agreements by the Board for the purchase of an estate or untenanted land, with the modification that all rents, profits, and arrears of rent shall be recoverable in like manner as if the Board were the owner of the estate or untenanted land. The modification, which leaves out all reference to the $3\frac{1}{2}$ per cent. interest, and which is not quite clearly expressed, may be accounted for by sect. 18 in its original form being mainly addressed to prompt re-sale to tenants who had agreed or were likely to agree to purchase, whereas the purchase by the Board was on a different basis, and admitted no such prompt clearance of responsibility. The complete accomplishment of their scheme of distribution and readjustment might require many months, even years. As the Board were already made landlords in 1893, the object of sect. 56 was manifestly to cover the intermediate situation before vesting. After vesting, the section could have no substantive effect whatever. This supplies a powerful argument against sect. 18 being construed as applying to an estate after it has become vested in the Commission. Suppose before 1909 an estate had been bought by the Commission on behalf of the Board, the nature of the Board's duties with regard to the acquired estates would make it highly unreasonable that the competence of the Commission to enforce rents by ordinary methods should be suspended after the estate was vested. As sect. 18 did not apply to purchases by the Board directly, as distinct from purchases by the Land Commission for them, sect. 56 confers on the Board, with modifications, the rights and remedies antecedent to vesting possessed by the Commission.

If, as we hold, none of the statutes negatives the competence of the Commission to apply a remedy incident to every reversion, it is impossible, on a loose impressionist view that they were not treated and described as landlords, to conclude that as against non-purchasing tenants they were deprived of ordinary proprietary rights. The interests of national finance would be set at nought by any such conclusion. An occupier, whose contract of tenancy is in full operation and unaffected by the Commission having

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K. B. Div. succeeded his former landlord in ownership, cannot rely on his refusal or omission to accept the statutory boon offered in respect of an estate bought out of public money as a defence to ejectment. No such defence would have been available against any new landlord to whom the Commission might sell the reversion.

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The rent as ascertained by the judgment will be reduced to £88 10s., striking out the year's rent due May 1st, 1914, without prejudice to the plaintiffs' right to recover said rent due May 1st, 1914, by such proceedings as may be applicable thereto. The judgment so varied will stand, and the motion will be refused with costs.

Dodd J. concurred.

A. E. C.

Dec. 18, 19, The defendants appealed (1).
20.

Jellett K.C. and *Pigot K.C.* (with them *Hugh Kennedy*), for the appellants:—

The appellants never refused to purchase the entire of their holding from the Land Commission; but they declined to purchase a part of the holding. The Land Commission purchased the estate for the purpose of re-selling the occupied lands to the tenants thereof, and they had no authority to re-sell to anybody else. If the Land Commission are not landlords within the Landlord and Tenant Act (Ireland) 1860, the action does not lie. The Land Commission were established with two main objects: namely, the regulation of the relation between landlord and tenant, and the abolition of that relation. In the land purchase code, introduced in 1870, and culminating in the Irish Land Act of 1909, the sole object was to abolish the system of landlordism.

The question whether a corporation created by statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it, or can be implied from the language used: *Dundee Harbour Trustees v. Nicol* (2). See also *Baroness Wênlöck v. River Dee Co.* (3).

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

(2) [1915] A. C. 530, at p. 556.

(3) 36 Ch. Div. 674.

We submit the following general propositions:—1, that the Land Commission are a statutory corporation, and that, accordingly, their object, powers, and liabilities must be ascertained from the statutes constituting them; 2, that the Land Commission have no powers or remedies except those expressly given to them by their statutes, or which may be reasonably implied therefrom; 3, the Land Commission can acquire estates only for the purpose of re-sale, and they are trustees of the acquired estates for the persons to whom they are directed to sell, viz., the tenants; 4, that, as the object of the Land Purchase Acts is the abolition of the relation of landlord and tenant, a power to eject a tenant, who is a cestui que trust, cannot be implied as incidental to the power and duty of re-selling to that tenant; 5, that the Act of 1860, based on the continuance of the relation of landlord and tenant on the footing of contract, is not in *pari materia* with the Land Purchase Code, the essence of which is the negation of the contract, and the abolition of that relation; and, as it is neither incorporated nor referred to in the Land Purchase Acts, its powers and remedies are not available to the Land Commission; 6, that the remedy of ejectment is inconsistent with the statutory position, powers, and duties of the Land Commission; 7, that as specific statutory remedies for the recovery of rent and possession are conferred upon the Land Commission, there cannot be implied another remedy for the same purpose from another statute which is not in *pari materia*, which is not incorporated, and which deals with entirely different conditions; 8, that the acquisition by the Land Commission of the landlord's estate does not involve the acquisition of his powers, as the Land Commission are a statutory corporation, whose powers arise from their statutes alone.

If the Land Commission were landlords, they would occupy an anomalous position; they would, in the first place, have the power of resumption, but as that power can only be put in operation as the result of an application to the Land Commission, they would on this hypothesis have to apply to themselves to authorize resumption; they would also have the right of pre-emption, which would involve having to fix the price themselves; further, the tenant could apply to fix a fair rent, the application would be to them, and they would fix the rent payable to themselves. The

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Land Commission were incorporated by sect. 42 of the Land Law (Ireland) Act, 1881. As to the purchase of estates, we would refer to the following statutes:—Landlord and Tenant (Ireland) Act, 1870, sect. 47; Land Law (Ireland) Act, 1881, sects. 26, 27, 34, sub-s. 4; Purchase of Land (Ireland) Act, 1885, sects. 5 and 7. Down to 1903 the Land Commission had power to purchase estates for the purpose of re-sale to the tenant. Is there anything in the Irish Land Act, 1903, indicating that estates might be bought and not sold to the tenants? So far from there being anything of the kind in the Act, we find that it contains a provision enabling the Land Commission to deem a tenant, who was unwilling to purchase, to have bought.

Under sect. 6 of the Act of 1903 the Land Commission cannot agree to buy an estate until they have undertakings signed by three-fourths of the tenants to purchase their holdings; and they base their offer to the landlord on the price which the tenants are willing to give. Given a case in which proceedings under the section have been taken, the relation between the tenants and the Land Commission is, as to three-fourths, certainly that of vendor and purchaser; but there is no difference between the relative positions of the three-fourths and one-fourth, for the Land Commission have power under sect. 19 of the Act of 1903 to compel the minority to purchase at the offers made to them. When the Land Commission buy an estate they buy it for all the tenants, the recalcitrant minority as well as the others. The proposal made to the landlord must be regarded as containing an offer to sell to all the tenants. When an estate is acquired in such circumstances does there not arise a fiduciary relation between the parties who have purchased the property and the persons for whose benefit they have got it? The State advances the money for the purchase of the estate to enable the tenants to become the owners of their holdings, and the policy of the Land Purchase Acts is not that the Land Commission should continue to maintain the role of landlords. The powers given to landlords under the Act of 1860, which was based on the continuance of the relation of landlord and tenant, cannot be read into a code devised to put an end to that state of affairs. Where it was intended that certain classes of persons, including the Congested Districts

Board, not occupying the position of ordinary landlords, should possess the powers of landlords, the Legislature said so expressly, e.g., in the Congested Districts Board (Ireland) Act, 1893, sect. 2; Purchase of Land (Ireland) Act, 1885, sect. 4; Land Law (Ireland) Act, 1896, sects. 10, 40, and 42; Irish Land Act, 1903, sects. 79 and 83; Irish Land Act, 1909, sects. 54 and 56.

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Sect. 18 of the Irish Land Act, 1903, provides that the rents and profits of any land agreed to be purchased by the Land Commission shall from the date of the agreement be payable to and recoverable by the Commission "as if they were instalments of purchase annuities charged upon holdings." For the recovery of annuities the Land Commission are empowered by the Land Law (Ireland) Act, 1887, sect. 18, sub-s. 1, to exercise the powers of sale and other powers conferred upon mortgagees by the Conveyancing Act, 1887. Sect. 18 of the Act of 1903 was brushed aside in the Court below on the ground that it applied only during the interval between the agreement to purchase and the date of the order vesting the estate in the Land Commission. We submit that no such limitation can be put upon the operation of the section, and that it prescribes a specific remedy which excludes the right of the Land Commission to maintain ejectment. A statutory corporation like the Land Commission, given a specific remedy by Act of Parliament, is confined exclusively to that remedy: *Wolverhampton New Waterworks v. Hawkesford* (1); *The Queen v. County Court Judge of Essex* (2); *Lamplugh v. Norton* (3); *Berkeley v. Ederkin* (4).

Wylie K.C. and *Babington*, for the respondents, were not called upon.

SIR IGNATIUS J. O'BRIEN C.:—

A case like the present is not likely to arise again. Up to the present it has never arisen, and in the result where a tenant is desirous of purchasing his holding I think it rests with himself whether he is to lose or to avail himself of the rights or privileges which are conferred on him by the Land Purchase code.

(1) 6 C. B. N. S. 336, at p. 356.

(2) 18 Q. B. D. 704, at p. 708.

(3) 22 Q. B. D. 452, at p. 456.

(4) 1 E. & B. 805, at p. 808.

Appeal. A most learned and ingenious argument and survey of the
 1917. sections of the statutes dealing with Land Law and Land Purchase
 IRISH LAND Acts has been presented to us by counsel for the appellants. But
 COMMISSION though I am greatly indebted for the assistance given to me by
 v. that argument, I must say it has wholly failed to convince me
 FORDE. that the appellants are entitled to succeed in the present appeal.
 Sir Ignatius J. O'Brien C.

The Earl of Westmeath was desirous of disposing of his interest in certain lands, forming his estate, to his tenants and, no doubt, after the usual negotiations, he originated proceedings with the Land Commission, who thereupon set in motion their powers under sect. 6 of the Act of 1903 to purchase the estate for the purpose of re-sale to the tenants. A proposal was in due course made by the Land Commission for the purchase of the entire estate, including tenanted and untenanted lands, at a price which came to £13,705. That money was duly advanced by the Treasury and brought to the credit of the estate, and on April 9th, 1914, a vesting order was made under sect. 16 of the Irish Land Act, 1903, vesting the estate in the Irish Land Commission.

In the present case, the defendants in the ejectment proceedings did not, until a date subsequent to the order vesting the estate in the Land Commission and subsequent to the ejectment proceedings, sign any undertaking to purchase their holdings. Their counsel have stated that they have now signed such an undertaking; but it has not yet been lodged. This cannot affect the question which we have to determine, and accordingly we must consider the case on the same facts as were before the Court below. The holding of the defendants is, accordingly, clearly not one which is the subject of an agreement to purchase between the Land Commission and the tenant. At a later date it may possibly become the subject of purchase, but this cannot affect the case as it comes before us.

It has been suggested that upon an analysis of the Land Purchase Code there is to be found a dominating intention which compels us to disregard the express terms of certain sections to which I shall presently allude, and to hold that the defendants are not or were not at the time of the decree tenants, but a sort of quasi-owners; and that even if they are in the position of tenants, by operation of sect. 18 of the Act of 1903 the

remedy of ejectment for non-payment of rent is taken away—the only procedure open being a suit for the recovery of the rent brought in the same way as an action for the recovery of arrears of rent due at the date of the purchase agreement and instalments of purchase annuities. The first point to be considered is what is the position of affairs at the time at which the Land Commission make the order under sect. 16 vesting the estate in themselves. I asked what was the reasonable effect of that section, and, in my view, no satisfactory answer was given to the question in the view presented by appellants. It provides that the Land Commission may, where they agree to purchase any land, make a vesting order which shall be effectual to pass to the Commission the fee-simple of the land purchased, subject, *inter alia*, “to any interests of the tenants on the land. Under the Land Law (Ireland) Act, 1881, “tenant” means “a person occupying land under a contract of tenancy, and includes the successors in title to a tenant,” and “tenancy” means “the interest in a holding of a tenant and his successors in title during the continuance of a tenancy; and ‘rent of a tenancy’ means the rent for the time being payable by such tenant or some one or more of his successors.” Accordingly, when sect. 16 of the Act of 1903 deals with the interest of the tenant from the date of the order vesting the estate in the Land Commission onwards until some further order is made destroying that interest, it treats that interest as continuing, and pre-supposes the existence of a landlord; and I decline to accept the suggestion that there is a quasi-landlord and a quasi-tenant or tenants who have no landlord. Looking at the actual forms prescribed in the rules of November 4th, 1907, for giving effect to the section, I find in Form “M” the vesting order is made subject “to any interests of the tenants on the lands,” following the terms of the statute.

If an undertaking to purchase had been signed by the defendants, and there had been something in the nature of a final acceptance, the position in law might possibly have been different; but for the purpose of considering the law relating to the case before us, counsel for the appellants have treated the case as one which more properly comes within sect. 19 of the Act of 1903; that is, where three-fourths of the tenants are willing to purchase, the

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 1917. the offers made to them. The defendants here were unwilling to
 IRISH LAND purchase, and are at the present moment alone in that respect.
 COMMISSION Sect. 19 also uses the word "tenant," and the meaning of the
 v. expression there cannot be different from that assigned to it in
 FORDE. other sections. While the phrase "interests of the tenant" so far
 Sir Ignatius J. as applicable to the person described as "tenant" in sect. 19 must
 O'Brien C. have the same meaning as in sect. 16.

Now sect. 19 is perfectly plain. It reads :—" Where an estate is purchased by the Land Commission, and tenants on the estate to the extent of three-fourths in number and rateable value have agreed to purchase their holdings, the Estates Commissioners may, if, having regard to the circumstances of the case, they think it expedient, order that the remaining tenants, or any of them, shall be deemed to have accepted the offers made to them, and the Land Purchase Acts shall apply accordingly, where the tenant could have obtained an advance of the entire purchase-money, and the Land Commission could have offered in the prescribed manner to make the advance."

It has been argued that sect. 19 must be interpreted as if it meant something wholly different from what it says in express terms. Of course the literal language of sections in Acts of Parliament has been so construed as to make it yield to the dominant intention as shown by other provisions in statutes. Such cases are, however, very rare ; and, indeed, except where the language is ambiguous I cannot, at the moment, recall any case which comes within anything like measurable distance of the argument which has been presented to us by the appellant's counsel. It will be observed that circumstances of expediency are referred to in the section. If on the grounds of expediency justice cannot be done to all the tenants, it is more reasonable that the remaining fourth, or some of them, should not be compelled to purchase at a price which they may fairly consider to be unreasonable. Of course jurisdiction is given to the Commissioners to consider whether or not an objection is frivolous or ill-founded ; but that is a very long way off from deciding that, apart from the circumstances, these tenants are to be treated as if they had agreed to purchase. There must in the nature of things be cases in which

the Commissioners do not consider it expedient that all or some of the recalcitrant tenants should buy. There was no necessity for the insertion of the words "if, having regard to the circumstances of the case, they think it expedient," if the section was intended to bring about automatically compulsory purchase by every tenant who had not signed an agreement to purchase. When it goes on to state that the Commissioners may "order that the remaining tenants, or any of them, shall be deemed to have accepted the offers made to them," it means that the circumstances have to be considered; that in justice and fairness these tenants shall be heard before they are compelled to purchase. Therefore, I decline to put upon the section a construction which would be unreasonable and, I think, impossible. If it is unreasonable and impossible it is perfectly manifest that there may come into existence a certain class of tenants who cannot be compelled to purchase, and whose holdings on the estate become vested under sect. 16 in the Land Commission. How am I to give legal effect to that situation unless I recognize the express description of the relation of the parties contained in the Act and the natural meaning of the transaction? The tenants who failed to sign undertakings to purchase have ceased to be tenants of the Earl of Westmeath. The appellants refused to sign, and were not compelled to purchase.

The estate of the Earl of Westmeath was transferred to the Land Commission. What estate? It must be the estate subject, according to sect. 16, to the tenancy of the persons who formerly had been tenants of the vendor. It cannot be anything else. The tenants are not owners in fee, and it would be grotesque to suggest that they had lost all the rights which the Act of 1881 conferred upon them, and which sect. 16 expressly reserves to them. The landlord or owner of the estate in reversion must be the Land Commission, in whom is vested all the rights of the Earl of Westmeath, while they are, at the same time, liable to all the obligations of every landlord in respect to tenants holding from them. "Landlord" and "tenant" have, in my opinion, the same meaning in the Land Purchase Acts as in the Act of 1860. Under sect. 1 of that Act "tenant" means "the person entitled to any lands under any lease or other contract of tenancy, whether the

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interest of such tenant shall have been acquired by original contract, lawful assignment, devise, bequest, or act and operation of law"; and "landlord" includes the person for the time being entitled in possession to the estate or interest of the original landlord, under any lease or other contract of tenancy, whether the interest of such landlord shall have been acquired by lawful assignment, devise, bequest and act and operation of law, and whether he has a reversion or not." "Landlord" and "tenant" must, for the purpose of the present proceedings, have the same meaning in all those Acts. In *In re Scott's Estate* (1) I dealt with all those statutes in connexion with the relation of landlord and tenant prior to the vesting order; and, for the purposes of my judgment, I found it absolutely essential to consider the position of a tenant under the Act of 1860 with regard to turbary and other rights conferred upon him by that Act. I then showed that when the fair rent provisions of the Act of 1881 came into operation they affected the same landlord, the same tenant, and the same holding which came within the scope of the earlier Act, and that the general policy of the Act of 1881 was directed to the preservation of the relation of landlord and tenant. Therefore if it is the same tenant, the same landlord, the same holding, and the same interest that are to be operated on by the fair-rent-fixing provisions of the Act of 1881, landlord and tenant in that Act must be the same persons whose relations were regulated by the Act of 1860; and it would be absurd to suggest that the powers of ejectment and other powers to enforce payment of rent given in the Act of 1860 did not, subject to certain modifications, exist in the Act of 1881.

The person who purchases under the Land Purchase Acts is, as a rule, the tenant who has acquired rights under the provisions of the Land Law Acts. He is not a different person. In some cases a class of persons artificially created is given the right to purchase: e.g., persons who are not tenants, but the descendants of tenants, may purchase, while certain persons approved by the Land Judge, and who may not fulfil all the conditions of tenancy prescribed by the fair-rent-fixing provisions, may also purchase; but, speaking generally, the tenants contemplated as purchasers, the tenants referred to in sect. 16 of the Act of 1903, are the same

(1) [1916] 1 I. R. 180, 185.

class of tenants who are entitled to have fair rents fixed in respect of their holdings, and who may be ejected under the Act of 1860. It has been held by Palles C.B. in *Ireland v. Landy* (1) that the Act of 1860 is in *pari materia* with the Acts of 1870 and 1881; but if there had been no such decision, I should without the slightest hesitation have come to the same conclusion.

If before there is a destruction of the tenancy or an absorption of it in the fee-simple through the operation of a sale under the Land Purchase Act to the tenant, the latter remains tenant, and the Land Commission is to be landlord, it would require words of the strongest and most coercive character in the statute to deprive the landlords of the powers of ejectment for non-payment of rent which are given to them by the Act of 1860. Of course, it was quite right for the appellants' counsel to endeavour to show, if they could, that the Land Commission never occupied the position of landlords; but I have, I think, demonstrated that where there are tenants who have not purchased—and the appellants are in that class—they continue to be tenants, and that by force of the Land Purchase Acts they become in a case like this tenants of the Land Commission until a sale to them is effected. It is, of course, quite possible that in such a case the Legislature might have considered it desirable to alter or affect the powers which ex hypothesi were given to the landlord. Even on that view sect. 18 of the Act of 1903, if it applies, does not give, as was contended, an exclusive remedy. The power exists quite irrespective of that section; and we cannot deprive landlords of it unless we can find in sect. 18 something which destroys it.

I do not desire to determine that the argument put forward by counsel for the Land Commission in the Court below was wrong, namely, that sect. 18 of the Act of 1903 was really confined to the intermediate period between the date of the agreement to purchase and the date of the vesting order. I do not wish to say that that argument may not be well founded. We have not heard Mr. Wylie, but it seems to me to be a fairly reasonable construction of sect. 18. I am, however, willing to read the section in these terms:—"The rents and profits of lands agreed to be purchased by the Land Commission shall from the date of the agreement be payable in like manner as if they were instalments

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(1) 22 L. R. Ir., at p. 421.

Appeal. of purchase annuities." Although I am willing to assume that
 1917. that may be the construction, it appears to me, as I have already
 IRISH LAND indicated, that as all these statutes are in *pari materia* with the
 COMMISSION Act of 1860, and while they may give a further drastic remedy
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 FORDE. Act of 1860, and which must have passed to the Land Commission,
 Sir Ignatius J. is not taken away, for otherwise they could not discharge their
 O'Brien C. duties satisfactorily.

For these reasons, the case appears to me to be perfectly clear, and the only trouble I have is in realizing that there can be any extraordinary difficulty in giving effect to the construction which, in my view, must be put upon sect. 18. At the same time, I appreciate all the arguments that have been addressed to us, and I have endeavoured to give them every consideration. If, however, I gave effect to them, I should put a fanciful construction upon the section. The Land Commission are entitled to hold the lands as landlords, the rights of landlords have passed to them, and the order of the Court below must be affirmed.

RONAN L.J. :—

I am of the same opinion. I decline to hold that in sect. 19 of the Act of 1903 the words "the Estates Commissioners may, if, having regard to the circumstances of the case, they think it expedient, order that the remaining tenants, or any of them, shall be deemed to have accepted the offers made to them" mean that in all cases, whether they think it expedient or not, they must order that all the remaining tenants shall be deemed to have accepted the offers made to them.

The section was intended to give compulsory powers of making the remaining tenants purchase. Such powers are strictly construed, but the attempt to construe the clause as making compulsory the exercise of these compulsory powers in all cases, surpasses anything I have hitherto heard in the way of argument.

MOLONY L.J. :—

I concur. The only question in this case is whether the Irish Land Commission are entitled to bring an ejectment for non-payment of rent. The holding was held under a statutory term

at the yearly judicial rent of £45. The proposal made by the Land Commission for the purchase of the estate contained a description of the tenancies which they proposed to take over, and also particulars of the suggested purchase-money and the annuities which the tenants so taken over would have to pay respectively if the purchase of their holdings by them were carried out. It set out, first, the tenanted land, including the particular holding of the appellants, erroneously stated to be in the occupation of Michael Smith. The purchase price mentioned was £960, involving an annuity of £31 4s.

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In order that a proposal to purchase the estate could be made by the Land Commission, they had to have at the time, under the provisions of sect. 6 of the Act of 1903, undertakings to purchase their holdings, signed by the tenants on the estate to the extent of three-fourths in number and rateable value. These undertakings were signed and lodged with the Land Commission, but, unfortunately, the defendants here did not sign their undertaking with the rest of the tenants. Following the proposal, the usual formalities were gone through, and on April 9th, 1914, a vesting order was made by the Land Commission, and the purchase-money was duly lodged to the credit of the estate in the bank.

The vesting order was made under the provisions, and follows the exact words of sect. 16 of the Act of 1903; and under that section the Land Commission upon the making of the order became owners of the lands in fee-simple, subject only to the rights which are mentioned in the section, and which are set out in the vesting order. These rights include any public rights affecting the land, any sporting rights reserved by the vendor, any interests of the tenants on the land or of persons having claims upon those interests, and any easements, rights, and appurtenances mentioned in sect. 34 of the Land Law (Ireland) Act, 1896; but, save as aforesaid, the estate vested in the Land Commission "discharged from the claims of all persons who are interested in the land, whether in respect of superior or intervening interests, or incumbrances or otherwise; and all such claims shall, as from the date of the vesting order, cease as against the land and attach to the purchase-money in like manner as immediately before the date of the order they attached to the land." The position at the date of that order was this: the Earl

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of Westmeath's estate was gone; all claims on the estate were transferred to the purchase-money; the Land Commission had become the owners of an indefeasible fee-simple estate, but they took that estate subject to the interests of the tenants on the land; and it has been seriously contended here that once the vesting order was made by the Land Commission there were no longer any tenants on the estate; that those who had occupied as tenants from the vendor had become equitable owners in fee-simple. "Tenant," as defined by sect. 57 of the Act of 1881, means a person occupying lands under a contract of tenancy, and the vesting order under which the Land Commission hold in fee-simple is, in the terms of the statute, expressly made subject to the tenancies. The effect of the vesting order was that the Earl of Westmeath's tenants became the tenants of the Land Commission. Of course, the primary object of the Land Purchase Statutes which they are to carry out is to enable tenants to become purchasers of their holdings. As regards those tenants who have lodged undertakings to purchase, there is no difficulty whatever; the prices and the purchase annuities have been arranged; there has been an agreement between them and the Land Commission, and there is no obstacle to the carrying out of purchase; but, unfortunately, some people are recalcitrant and difficult to deal with, and the Legislature had to come to a conclusion as to what was to be done with these people. We have to find out what was the intention of Parliament with regard to these people, and this brings us to a consideration of sect. 19.

I confess that, like the other members of the Court, I have found no difficulty in construing sect. 19, although I have listened with attention to the very able arguments presented to us by Mr. Jellett and Mr. Pigot. Let us read that section with our ordinary knowledge of the English language, and without reading into it anything which it does not contain, and we will see that it prescribes in clear language the powers which the Estates Commissioners may exercise in certain events. It provides that, "where an estate is purchased by the Land Commission and tenants on the estate to the extent of three-fourths in number and rateable value have agreed to purchase their holdings, the Estates Commissioners may, if, having regard to the circumstances of the case, they think it expedient, order that the remaining tenants, or any

of them, shall be deemed to have accepted the offers made to them." Does that mean that the Estates Commissioners are bound to make an offer, and are bound to exercise the power of compulsion given to them? The section cannot have that meaning, because it is only when they have regard to the circumstances of the case, and, having regard to such circumstances, they think it expedient, that they may order the remaining tenants, or any of them, to be deemed to have accepted the offers made to them. In the present case, the tenants did not sign an undertaking to purchase, and the Estates Commissioners have not chosen, for reasons satisfactory to them, to exercise the power which they have under sect. 19; and the question is, if the tenants do not sign any undertakings to purchase, and the Land Commission do not see their way to compel them to purchase under sect. 19, what is the position of affairs? The effect of the section, in my opinion, is that these tenants may be compelled to purchase, but that sect. 19 does not confer upon them an equitable fee-simple estate, and enable them to say that although they did not agree, and the Land Commission did not compel them, to purchase, they were still not subject to the liabilities of tenants.

A great part of the argument in the present case has been concerned with sect. 18 of the Irish Land Act, 1903, and I am willing to assume with Mr. Jellett, without in any way deciding, that that section creates new rights in the Land Commission applicable to this case. I am, however, satisfied that there is nothing in sect. 18 to show that the remedy it confers is an exclusive remedy. Consequently, giving every weight to the arguments which have been addressed to us, I have no doubt in coming to the conclusion that, if the tenant of a holding purchased by the Land Commission has not undertaken to purchase his tenancy, and the Estates Commissioners do not choose to exercise their compulsory powers under sect. 19, he remains in that case, under the terms of the vesting order, a tenant and is liable to all the ordinary rights and liabilities of a tenant.

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Solicitor for the appellants: *Daniel Purcell.*

Solicitor for the respondents: *William Alexander.*

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THE KING (AT THE PROSECUTION OF WILLIAM BRYSON AND OTHERS) *v.* THE GUARDIANS OF THE POOR OF LISNASKEA UNION AND THE LOCAL GOVERNMENT BOARD FOR IRELAND (1).

Certiorari — Judicial or quasi-judicial acts — Local Government — Poor law guardians — Superannuation allowance — Union Officers Superannuation (Ireland) Acts, 1865 and 1872 (28 & 29 Vict. c. 26, and 35 & 36 Vict. c. 89) — Local Government Board (Ireland) Act, 1872 (35 & 36 Vict. c. 69) — Union Officers (Ireland) Act, 1885 (48 & 49 Vict. c. 80) — Resolution by guardians — Want of evidence — Local Government Board — Consent — Consent to invalid resolution — Order without jurisdiction — Consent varying amount of allowance — Excess of jurisdiction — Conditional order — Application — Affidavit — Uberrima fides.

Where the power to do an act is vested in a public body or department, and necessarily implies the determination of the existence of facts and conditions under which the power is exercisable, such body or department in exercising such power acts in a judicial or quasi-judicial capacity, and must decide on the existence of such facts or conditions on relevant and material evidence, though not necessarily under the strict rules of evidence binding judicial tribunals proper. Any such act which is done without any or sufficient evidence of the kind mentioned is reviewable, and can be quashed on certiorari as made without and in excess of jurisdiction.

The jurisdiction to grant superannuation allowances to officers of poor law unions, conferred on poor law guardians by the Union Officers Superannuation (Ireland) Acts, 1865 to 1872 (28 & 29 Vict. c. 26, and 35 & 36 Vict. c. 89), and the Union Officers (Ireland) Act, 1885 (48 & 49 Vict. c. 80), and the jurisdiction conferred on the Local Government Board for Ireland by the above statutes and the Local Government Board (Ireland) Act, 1872 (35 & 36 Vict. c. 69), to consent to the grant of such allowances, depend in their exercise upon the existence of the statutory conditions under which such allowances can be made.

A grant made without evidence of or materials for the determination of the existence of such conditions is *ultra vires*, and made without and in excess of jurisdiction, and the Local Government Board cannot by their consent give effect to such invalid grant.

The jurisdiction to consent to the grant of such allowance conferred by the above statutes on the Local Government Board is merely jurisdiction to give or refuse consent, and an order of the Board consenting to the grant, but varying the amount granted, is made in excess of jurisdiction.

(1) Before SIR JAMES CAMPBELL C.J., and GIBSON, MADDEN, and KENNY JJ.

Nine persons, described as ratepayers in the union, obtained a conditional order for a certiorari to bring up and quash a resolution of the poor law guardians granting a pension to the former master of the workhouse of the union. Six of the prosecutors were also guardians, and were present at the meeting at which the resolution impeached was passed unanimously. This fact was not expressly stated in the affidavit grounding the application for the conditional order; but that affidavit set out fully the history of the case, exhibited the minutes of the meeting, showing the names of the six prosecutors as present, and stated that at a subsequent meeting, at which two of the prosecutors were present, a protest was entered against the consent of the Local Government Board to the grant of the pension.

Held, 1, that even if there was a want of uberrima fides as regards the six prosecutors who were guardians, and voted the grant, that could not affect the three remaining prosecutors, and the order could be amended, if necessary, by striking out the names of these six prosecutors; and, 2, that on the facts it was impossible to conclude that there was any desire or motive to deceive, and there was no lack of uberrima fides on the part of the prosecutors.

CERTIORARI.

Motion to make absolute a conditional order for a writ of certiorari to bring up and quash (*a*) a resolution, dated 10th March, 1917, of the Guardians of Lisnaskea Union granting a superannuation allowance of £31 3s. 4d. to Thomas Lunney, formerly workhouse master of that union; and (*b*) a sealed order, dated 22nd May, 1917, of the Local Government Board, consenting to the grant to Thomas Lunney of a superannuation allowance of £20 3s. 2d. On the 27th July, 1916, at the instance of the Guardians of the Lisnaskea Union, a sworn inquiry was held by the Local Government Board for Ireland into the conduct of Thomas Lunney, the master of the workhouse of the union, and on the 25th August following the Board by letter informed the guardians that, as the result of the facts elicited at the inquiry and Lunney's previous record, they were of opinion that Lunney was unfitted to hold the post of master of the workhouse, and that unless he resigned forthwith they would issue a sealed order dismissing him from the post. Attempts were made by Lunney, by the guardians, and also by residents in the district to obtain a reconsideration of this decision by the Board, the petition presented by the residents stating that Lunney's removal would be a "serious loss to the union"; but the Board refused to reconsider their decision, stating that it had been arrived at after grave consideration; and on the

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K. B. Dwy. 14th September, 1916, finally informed the guardians by letter that unless Lunney's resignation was received at the next meeting of the guardians the sealed order for his dismissal would be forthwith issued. Lunney thereupon gave a month's notice to the guardians, and his resignation having been duly received, he ceased to hold office on the 16th October, 1916.

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The guardians then attempted to appoint Lunney as temporary workhouse master, but the Board refused to sanction any such appointment. Subsequently on the 27th January, 1917, a notice of motion was handed in at the meeting of the guardians, the motion being for the grant to Lunney of a superannuation allowance, and being for the meeting of the guardians to be held on the 10th March following. The Board having learned of this motion wrote, on the 8th February, 1917, to the guardians pointing out that the guardians had no power to grant any such allowance, as Lunney's resignation had not been caused by old age, permanent infirmity of mind or body, or by the abolition of his office. This letter was received by the guardians, and apparently read at their meeting held on the 10th February, 1917, but no reply or order or direction thereon was made. On the 10th March, 1917, at a meeting attended by thirty-six out of a possible forty-three guardians, a resolution to grant to Lunney a superannuation allowance of £31 3s. 4d. was passed unanimously; the letter from the Board of the 8th February was not brought to the notice of the meeting in any way, nor were any medical certificates as to Lunney's health before this meeting. On the 11th March, 1917, Lunney obtained from a Dr. Tierney a medical certificate which certified that Lunney was suffering from varicose veins (non-operable), cardiac disease, cerebral irritation, and neurasthenia, and that he was consequently incapacitated from discharging the duties of workhouse master; and three days afterwards Lunney obtained from a Dr. Thompson a further certificate that he, Lunney, was suffering from varicose veins in both legs, and cardiac dilatation. These two certificates were sent by Lunney to the Board on the 15th March, 1917, and the Board thereupon sent to the guardians a printed form of queries asking inter alia for an answer to the query, "Cause of resignation (i.e. either 'old age,' or 'permanent infirmity of mind or body'; and if the latter

annex medical certificate"), to which the following answer was made :—" He did not resign from 'old age.' A medical certificate was not submitted to the board showing that he was resigning through 'permanent infirmity of mind or body.' "

On the 26th April, 1917, the Board received the answers to the queries, and, according to the affidavit of their secretary, Mr. Barlas, "gave the entire matter full consideration, and formed the opinion that the diseases from which the said Thomas Lunney was certified to be suffering were such that they must have existed for some time prior to his resignation, and that apart from the circumstances which led to his resignation he was an officer who would have been entitled to a full superannuation allowance." On the 22nd May, 1917, the Board issued the following sealed order :—" Whereas Thomas Lunney, who lately held the office of master of the workhouse of the Lisnaskea Union, did become incapable of discharging the duties of the said office with efficiency by reason of permanent infirmity of body as certified by medical certificate, and did resign the said office, and whereas the board of guardians of the said union at a monthly meeting held on the 10th day of March, 1917, did resolve to grant to the said Thomas Lunney a superannuation allowance, and whereas the salary together with the average annual emoluments of the said office at the time of the resignation of the said Thomas Lunney amounted to the sum of £80 12s. 8d. Now, therefore, in pursuance of the provisions of the Union Officers (Ireland) Superannuation Acts, 1865 and 1872, we the Local Government Board for Ireland do hereby consent to an annual allowance of £20 3s. 2d. being paid by the guardians of the poor of the Lisnaskea Union to the said Thomas Lunney."

On the 23rd May, 1917, the Board wrote to the guardians pointing out that although Lunney was compelled to resign in September, 1916, his superannuation was not voted until the following March, and that the medical certificates which had been submitted to the Board were not before the guardians when the allowance was granted, and in view of the circumstances the Board had "grave doubts as to the propriety of consenting to the guardians' proposal; however, in order to meet the guardians' wishes as far as possible in the matter," they had decided to

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K. B. Div. sanction the grant to Lunney of a superannuation allowance, but
 1917. "having regard to the circumstances under which he ceased
R. to hold office" they were not prepared to allow any years to be
 (BRYSON) added to his actual period of service for the purpose of calculating
v. his pension, which would consequently be fixed at £20 3s. 2d. a year.
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At a meeting of the guardians held on the 2nd June, 1917, at which two of the prosecutors were present, the following resolution was passed :—"That this board enter their protest to the decision of the Local Government Board that the late master retired from permanent infirmity, as the Local Government Board knew that he retired as the result of a sworn inquiry and under the order of the Local Government Board."

The conditional order was obtained on the 20th November, 1917, upon the application of William Bryson, John Alexander Boles, William Gardiner, William Irvine, Robert Irvine, Campbell Erskin, Hugh Kirkpatrick, Hugh Fleming, and Francis Hull. The affidavit grounding the application described the prosecutors as "rated occupiers in the union," but did not state that any of them were guardians or were present at the meeting of the 10th March, 1917; but it set out all the facts of the case and exhibited the minutes of that meeting, in which the names of the guardians then present were entered. As a fact six of the prosecutors, namely, Hugh Kilpatrick, William Gardiner, Campbell Erskin, Hugh Fleming, William Bryson, and William Irvine, were guardians, and were present at the meeting of the 10th March, 1917.

Affidavits showing cause were filed by the secretary of the Local Government Board, by Thomas Lunney, and by Edward Gallagher, vice-chairman of the Board of Guardians. Lunney in his affidavit stated that he had held office for fifteen years; that in consequence of worry his health began to fail several years previously; and that the guardians were for the greater part well aware that he was in bad health. Gallagher in his affidavit stated that the majority of the guardians considered Lunney entitled to a superannuation allowance, "having regard to his impaired health, which latter fact was well known to all the guardians." The grounds upon which the conditional order was obtained were the following :—

1. That the said resolution and order were passed and made in excess of and without jurisdiction.

2. That the said order was made contrary to and in disregard of natural justice. K. B. Div.
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3. That there was no evidence before either the said guardians at the time of passing said resolution or before the Local Government Board at the date of making said order that the said Thomas Lunney had become incapable of discharging the duties of his office with efficiency by reason of any permanent infirmity of body. R.
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4. That there is and was no finding or determination by either the said guardians or the said Local Government Board that the said Thomas Lunney had become incapable of discharging the duties of his office for the reasons aforesaid.

5. That, in fact, the said Thomas Lunney had been compelled to resign his said office by the said Local Government Board under threat of dismissal by reason of his misconduct in said office found by the said Local Government Board after sworn inquiry, to the knowledge both of the said guardians and said Local Government Board at the time of said resolution and order respectively.

6. That the medical certificates referred to in said order were never before the said guardians at the time of passing said resolution.

7. That the allowance purported to be granted to said Thomas Lunney by said resolution and order was not made upon the said Thomas Lunney resigning his said office, but long subsequent to such resignation, and when he had, in fact, ceased for many months to hold said office.

8. That the said Local Government Board had already, prior to said order, refused their sanction and consent to the granting of any allowance to the said Thomas Lunney.

The following are the material portions of the enactments referred to in the arguments and judgment:—

Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56):—

Sect. 114. No order of the commissioners or guardians or any of them, made under the powers of this Act, shall be removed or removable by writ of certiorari into any court of record, except Her Majesty's Court of Queen's Bench at Dublin.

Union Officers Superannuation (Ireland) Act, 1865 (28 & 29 Vict. c. 26):—

Sect. 1. The guardians of any union in Ireland may, at their discretion, with the consent of the commissioners for administering the laws for the

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relief of the poor in Ireland, grant to any officer whose whole time has been devoted to the service of the union, and who shall become incapable of discharging the duties of his office with efficiency, by reason of permanent infirmity of mind or body, or of old age, upon resigning or otherwise ceasing to hold his office, an annual allowance not exceeding in any case two-thirds of his then salary, and shall charge such allowance to the same account as that to which such salary would have been charged if he had continued in his office.

Sect. 3. No officer shall be entitled to such allowance on the ground of age who shall not have completed the full age of sixty years, and shall not have served as an union officer for twenty years at the least.

Sect. 4. No grant shall be made without one month's previous notice, to be specially given in writing to every guardian of the union, of the proposal to make such grant, and the time when it shall be brought forward.

Local Government Board (Ireland) Act, 1872 (35 & 36 Vict. c. 69):—

Sect. 2. . . . All powers and duties vested in or imposed on the commissioners for administering the laws for the relief of the poor in Ireland . . . shall be transferred to and imposed on the said Local Government Board, and, except as otherwise provided in this Act, shall be exercised and performed by such Board in like manner and form, and subject to the same conditions, liabilities, and incidents respectively, as such powers and duties might before the passing of this Act, have been exercised and performed by the authorities in whom the same were then vested respectively, or as near thereto as circumstances admit.

Sect. 5. In the construction of and for the purposes of any Act of Parliament . . . passed . . . or made before the establishment of the Local Government Board, but so far only as may be necessary for exercising the powers and discharging the duties of this Act transferred to and imposed on the Local Government Board, the name of such Board shall . . . be deemed to be substituted for the commissioners for administering the laws for relief of the poor in Ireland . . . and any act or thing which might if this Act had not passed, have been done by the commissioners for administering the laws for relief of the poor in Ireland . . . so far as relates to the powers and duties hereby transferred, may be done by the Local Government Board.

Union Officers (Ireland) Act, 1872 (35 & 36 Vict. c. 89):—

Sect. 1. This Act and the recited Act (28 & 29 Vict. c. 26) may be cited together as "The Union Officers (Ireland) Superannuation Acts, 1865 and 1872."

Sect. 2. . . . In computing the salary of any officer of a union under the recited Act and this Act, the amount of the emoluments of his office on the average of the three years concluded in the last preceding quarter may be taken into calculation by the guardians, and the allowance awarded in respect thereof under the recited Act and this Act shall be charged upon the rates of the union at large.

Union Officers (Ireland) Act, 1885 (48 & 49 Vict. c. 80):—

Sect. 2. The board of guardians of any union in Ireland may grant to any person retiring or removed from the service of the union by reason of the abolition of his office, to whom a superannuation allowance might be granted under the Union Officers Superannuation (Ireland) Act, 1865 (28 & 29 Vict. c. 26), or any Act amending the same, such annual allowance by way of compensation for loss of office as they might have granted to that person if he was retiring from his office by reason of permanent infirmity of mind or body. Such allowance shall be granted in the same manner and subject to the same conditions, and shall be payable out of the same funds, as if it were a superannuation allowance granted in accordance with the provisions of the said Acts.

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D. Henry K.C. (with him *J. C. Davison*), for the prosecutors:—

The guardians are the persons empowered to grant the superannuation allowance, but they can only do so with the consent of the Local Government Board, and on retirement from office by reason of old age, permanent infirmity of mind or body, or abolition of the office: Union Officers Superannuation (Ireland) Acts, 1865 and 1872 (28 & 29 Vict. c. 26, and 35 & 36 Vict. c. 89); Local Government Board (Ireland) Act, 1872 (35 & 36 Vict. c. 69); Union Officers (Ireland) Act, 1885 (48 & 49 Vict. c. 80). The jurisdiction to grant the allowance is limited by conditions, the existence of which must be determined by the guardians before the grant can be made. Here there was not any question of the abolition of the office or of old age. The guardians had to determine whether Lunney's resignation was due to permanent infirmity of mind or body, and that determination was essentially a judicial act reviewable on certiorari: *R. (Wexford County Council) v. Local Government Board (Webster's Case)* (1). The guardians had not a scrap of evidence as to Lunney's health when they passed their resolution of the 10th March, 1917. On the contrary, their action in endeavouring to continue him in office or to have him made temporary Master showed that they considered him physically and mentally fit to discharge the duties of his office. The order of the Board of 22nd May, 1917, depends on the validity of the guardians' resolution, and stands or falls with that resolution.

K. B. Div. *Serjeant A. M. Sullivan K.C. and E. S. Murphy, for the*
 1918. guardians:—

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We resist the application on three grounds. First, because uberrima fides was not shown by the prosecutors when they applied for the conditional order; secondly, because the acts of the guardians and of the Local Government Board in granting the pension and consenting to the grant were administrative acts in respect of which certiorari does not lie either at common law or under sect. 114 of the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56); thirdly, on the facts the Local Government Board, having approved of the grant, the Court cannot go behind the order of the Board. As to the first point, the prosecutors are not entitled to the writ *ex debito justitiæ*, and they were bound to disclose to the Court, on their application for the conditional order, all the material facts. There are nine prosecutors, and six of them are guardians, and were actually present at the meeting of the 10th March, 1917, when the resolution to grant the pension to Lunnery was passed unanimously. The fact that any of the prosecutors were guardians present at that meeting was not disclosed on the affidavit grounding the motion for the conditional order. *R. v. General Commissioners for Income Tax, Ex parte Princess de Polignac* (1), where Lord Reading, at p. 495, says:—"Where an *ex parte* application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits." *Cozens-Hardy M.R.*, at p. 504, states the same view, and refers to the authorities on this principle: *Atkin v. Moran* (2).

As to the second point, the act of the guardians and the act of the Board were clearly administrative in character. The master was not entitled as of course to the pension; it was a gratuitous grant by the guardians. The essence of a judicial act is that it affects rights or imposes liabilities; that there should be some matter as to the rights or liabilities of parties in dispute on which

(1) [1917] 1 K. B. 486.

(2) I. R. 6 Eq. 79.

a decision is necessary. In *R. (Wexford County Council) v. Local Government Board (Webster's Case)* (1), there was a matter in dispute as to the amount of salary and emoluments to which an officer was entitled, and the determination was a judicial act reviewable on certiorari: *R. (McCarthy) v. Cork Justices* (2). It was not necessary to state the reasons for the grant on the face of the resolution; and the resolution was an inchoate act until the consent of the Local Government Board had been obtained.

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As to the third point, the Local Government Board were entitled in giving their consent to act on the evidence before them. The medical certificates were before the Board, and they gave the matter their full consideration. The Board, as appears from their order, came to the opinion that Lunney was incapacitated by permanent infirmity of body; and the order is good, and completes the grant made by the resolution of the guardians: *R. (North Dublin Rural District Council) v. Local Government Board* (3).

Wylie K.C. and Overend, for the Local Government Board:—

The act of the Local Government Board in consenting is a purely ministerial act; it does not affect rights or impose liabilities: *R. (Eustace) v. Local Government Board* (4). The Board is substituted for the Poor Law Commissioners (Local Government Board (Ireland) Act, 1872 (35 & 36 Vict. c. 69)). Their decision does not bind the auditor, and if he made a surcharge in respect of the pension, the party surcharged could come into this Court to challenge the surcharge. The power of the guardians is discretionary on the officer resigning or ceasing to hold office otherwise (Union Officers Superannuation (Ireland) Act, 1865 (28 & 29 Vict. c. 26)). The whole action of the Local Government Board was of a ministerial character; and if they had refused to consent, the guardians, who are the persons who grant the pension, could have questioned the decision. In any event, the Board's order is not bad as made without evidence. The question they had to determine was whether there was any physical infirmity which could relate back; the Board had the medical certificates and their own medical advisers. The Board might dismiss an insane man for some misconduct without knowing of his insanity until

(1) [1902] 2 I. R. 349.

(3) [1917] 2 I. R. 454.

(2) [1910] 2 I. R. 421.

(4) 44 I. L. T. R. 174, 176.

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after the dismissal, when certificates were produced to show that the man was insane at the time he did the act for which he was dismissed. [SIR JAMES CAMPBELL C.J.: What limit of time are you going to suggest for such an inquiry? Does not the section refer to resignation consequent on physical or mental infirmity?] The time in every such case is a question of reasonableness, which can be decided on the evidence afforded by the certificates and the advice of the Board's medical experts. Where a man ceases to hold office and is, in fact, suffering from physical or mental infirmity which incapacitates him from discharging the duties of his office, he is not deprived of his pension if the guardians grant it.

The Board could have been set in motion by a paid officer, under sect. 26 of the Poor Relief (Ireland) Act, 1838 (1 & 2 Vict. c. 56), and the functions of that officer would be clearly ministerial; and the consent of the Board to the guardians' resolution is as ministerial in character: *R. (North Dublin Rural District Council) v. Local Government Board* (1).

In any event, the proper remedy, if any, was by prohibition: *R. (O'Ferrall) v. Sheehan* (2).

Lardner, for Thomas Lunney.

J. C. Davison, in reply:—

The whole history of the case is stated in the prosecutors' affidavit, and in any event three of them are ratepayers. The consent of the Board may be and is here a judicial act: *R. (Wexford County Council) v. Local Government Board (Webster's Case)* (1); and in any event the Board acted without jurisdiction in altering the amount granted.

Cur. adv. vult.

SIR JAMES CAMPBELL C.J. read the following judgment of the Court:—

In the month of July, 1917, a sworn inquiry was held by an inspector of the Local Government Board into charges of alleged misconduct against the then Master of the workhouse of the Lisnaskea Union, and as a result they wrote to the guardians on

(1) [1917] 2 I. R. 454.

(2) [1898] 2 I. R. 683.

25th August, 1916, a letter which contained the following passage:—"The Board are clearly of opinion that the facts elicited at the inquiry, taken in conjunction with his previous record, prove that Mr. Lunney is unfitted for the position of Master of a workhouse, and if he does not immediately resign the Board will, without further notice, issue an order under seal removing him from office." Attempts were made by the guardians, and by public memorial, as well as by Mr. Lunney himself, to induce the Local Government Board to reconsider their decision, but without effect; and it is important to note that, up to this stage in the proceedings, there was no hint or suggestion that the Master was suffering from any physical incapacity or infirmity; but, on the contrary, the whole effort was to induce the Local Government Board to allow him to retain his office, the public memorial stating that his removal from office would be a serious loss to the Lisnaskea Union. On September 14th, 1916, the Local Government Board wrote to the guardians adhering to their decision, and intimating that as Lunney's resignation was not tendered and accepted by the guardians at their meeting on the 16th September, the Board would issue an order under seal removing him from his position. Lunney, consequently, tendered his resignation, which was accepted by the guardians at their meeting on 16th September, but at their subsequent meeting on 14th October, they elected him a temporary Master, any suggestion of physical incapacity or infirmity in his past being still conspicuous by its absence. Upon October 25th the Local Government Board wrote declining to sanction the re-appointment of Lunney, even temporarily; and the next stage in these remarkable proceedings was a notice of motion, given at the meeting of the guardians on January 27th, 1917, for their meeting on 10th March following, to the effect that the maximum superannuation allowance be fixed and granted to Lunney. This elicited from the Local Government Board a letter of 8th February, 1917, to the clerk of the guardians, which is so important that I will quote it in full:—"The Local Government Board for Ireland have had before them an entry in minutes of proceedings of the Board of Guardians of Lisnaskea Union on the 27th ultimo of a notice of motion for the 10th prox., to

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K. B. Div. grant a superannuation allowance to Mr. Thomas Lunney in
 1918. respect of his services as Master of the workhouse; and the Board
 R. desire to point out that as Mr. Lunney's retirement was not
 (BRYSON) necessitated by his old age or infirmity, or the abolition of his office,
 v. there is no power to grant him a superannuation allowance."
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—
 Sir James
 Campbell C.J. At the meeting of the guardians on 10th March, 1917, there
 was a record muster, no less than thirty-six, out of a possible forty-
 three, attending; and the motion for the grant of superannuation
 was passed, without, apparently, objection or protest on the part
 of any guardians present. Since the hearing I have been looking
 through the affidavits and exhibits in the case, and find that that
 which is referred to as exhibit *O* in the affidavit of Mr. Barlas as
 a copy of the minutes of the 10th March is a copy merely of the
 portion dealing with the resolution itself. I have since been
 furnished with a complete copy, and found that from beginning
 to end, though they recite that several letters dealing with
 comparatively trivial matters were produced and read, and
 directions given in reference to them, they contain no reference
 of any kind to this important letter of the 8th February. I,
 therefore, called for copies of the minutes of all meetings held
 between the 8th February and 10th March, with the result that
 I find the following entry in the minutes of a meeting on
 10th February: "The following letters from the Local Govern-
 ment Board for Ireland and others were read by the clerk, and
 directions given to answer them respectively to the following
 effect (or orders made on them respectively as follows)."
 Amongst these letters so read was the letter of the 8th February,
 but it met with scant courtesy, because, according to the minutes,
 not only was it not discussed, but no direction for a reply was
 given, nor was any order of any kind made in reference to it. In
 fact, no reply to it was ever given, nor, so far as the minutes dis-
 close, was it ever referred to again at any subsequent meeting.
 Upon the 10th February, 1917, there were only seven guardians
 present, the chairman being Mr. McElguin, who also was in the
 chair on 10th March following, and, to say the least of it, it was
 a grave omission on the part of this gentleman and the clerk to
 fail to bring this letter under the notice of the thirty-six guardians
 who mustered at the meeting of the 10th March following, more

especially as, under the provisions of the Superannuation Act, each member of the board of guardians had received a month's previous notice of the intention to propose the resolution. The vital fact as to the resolution itself is that the guardians proceed to pass it without the slightest allusion to physical incapacity or infirmity, and without a particle of evidence on the subject. On the 14th March, Lunney, having apparently become alive for the first time to the importance of this consideration, wrote to the Local Government Board, enclosing two medical certificates, the first, dated 11th March, from a Dr. Tierney, certifying that Lunney was incapable of discharging his duties as Master owing to physical debility, due to varicose veins, cardiac disease, cerebral irritation, and neurasthenia; and the second, dated 14th March, from a Dr. Thompson, certifying to the same incapacity, as the result of varicose veins and cardiac dilatation, the cerebral irritation and neurasthenia having apparently disappeared in the interval since his examination by Dr. Tierney, three days before. Upon receipt of these certificates the Local Government Board, most unwisely and for some reason unexplained, furnished the guardians with a number of queries on the subject, one of which only with the answer is material, namely, number 5. "Cause of resignation (i.e., whether 'old age' or 'permanent infirmity of mind or body'; and if the latter annex medical certificate)." Answer:—"He did not resign from 'old age.' A medical certificate was not submitted to the board, showing that he was resigning through 'permanent infirmity of mind or body.'" This answer is craftily framed, as it neither denies nor affirms that he resigned from permanent infirmity, while it insinuates that he did. In what circumstances this evasive answer came to be given does not appear; the entire form seems to have been filled in by the clerk of the board of guardians, and, in the absence of any explanation from him, it is impossible to say whether he did so after consultation with his board or any of its members.

No explanation or excuse has been suggested for this action of the Local Government Board in submitting such a question with full knowledge that the cause of resignation was their own persistent demand, as an alternative to dismissal under their sealed order for misconduct, and still more inexplicable is their action, in the

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K. B. Div. face of their own letter of 8th February, in issuing upon the 22nd
 1918. May, 1917, a sealed order consenting to the grant of a superannua-
 R. tion allowance of £20 3s. 2d., which contains upon its face the
 (BRYSON) following recital, which, to say the least of it, was calculated, if not
 v. intended, to convey a false impression:—"Whereas Thomas Lunney,
 LISNASKEA who lately held the office of Master of the workhouse of Lis-
 P. L. G. naskea Union, did become incapable of discharging the duties of
 — the said office with efficiency, by reason of permanent infirmity of
 Sir James body, as certified by medical certificates, and did resign the said
 Campbell C.J. office," etc. It is impossible, in my opinion, to construe this
 document otherwise than as an official declaration by the depart-
 ment—first, that the cause of Lunney's resignation was permanent
 infirmity of body; and, second, that such infirmity was, at the
 time of the resignation, certified by medical certificates. The Local
 Government Board have filed an affidavit in this matter, sworn by
 their Secretary, Mr. Barlas, and the only attempt at explanation
 by them of this singular proceeding is to be found in paragraphs 16
 and 17, to the following effect:—Paragraph 16 sets out the receipt
 and effect of the two medical certificates, to which I have already
 referred, and paragraph 17 then proceeds as follows:—"On the
 26th April, 1917, the Board received form of queries in connexion
 with the pension of £31 3s. 4d., granted to Mr. Lunney. The
 Board, thereupon, gave the entire matter full consideration, and
 formed the opinion that the diseases from which the said Thomas
 Lunney was certified to be suffering were such that they must have
 existed for some time prior to his resignation, and that, apart from
 the circumstances that led to his resignation, he was an officer who
 would have been entitled to the full superannuation allowance."
 Contrast these statements with those contained in a letter from the
 Board to the guardians, dated May 23rd, 1917, the day after the
 date of their sealed order consenting to the superannuation
 allowance, and which reads as follows:—"The Local Government
 Board for Ireland have received the replies to their queries,
 relative to the proposal of the board of guardians of Lisnaskea
 Union to grant a retiring allowance to Mr. Thomas Lunney, in
 respect of his services as Master of the workhouse, and the Board
 desire to draw attention to the facts, that, although Mr. Lunney
 was compelled to resign the position in question in September

last, his superannuation was not voted until the following March, and that the medical certificates which have now been submitted to the Board were not before the guardians when the allowance was granted. In view of these circumstances the Board has grave doubts as to the propriety of consenting to the guardians' proposal. However, in order to meet the guardians' wishes as far as possible in the matter, they have decided to sanction the grant of a superannuation allowance to Mr. Lunny, but having regard to the circumstances under which he ceased to hold office, they are not prepared to allow any years to be added to his actual period of service for the purpose of calculating his pension, which will, consequently, be fixed at £20 3s. 2d. a year." The words in this letter "having regard to the circumstances under which he ceased to hold office" are identical with those in the affidavit of Mr. Barlas, and are a direct admission that his resignation was not given on account of or caused by physical infirmity, and the sole and only ground upon which consent to the superannuation is sought to be defended is "in order to meet the guardians' wishes." The sealed order of consent in this case is a printed form, but inasmuch as the jurisdiction to consent depends upon a previous valid resolution by the guardians granting the superannuation, the proper course for the Local Government Board to adopt in such cases would be to recite in their order of consent the resolution itself upon which their jurisdiction depends, and not to paraphrase it according to their own ideas as to what it ought to have contained. Further, we are of opinion that the Local Government Board had no power or jurisdiction to interfere with the amount of the grant. Their function is to grant or withhold their consent to the actual resolution, leaving it to the guardians, in the latter case, if the objection is as to the amount, to pass a fresh resolution.

The next matter worthy of notice is that, while affidavits have been filed in this motion by Mr. Lunny and the vice-chairman of the guardians, the affidavit of the former does not contain a hint as to any physical infirmity, either at the date of his resignation or since, while that of the vice-chairman merely states "that in the opinion of the majority of his Board they considered the Master entitled to a superannuation allowance for his past

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services, having regard to his impaired health, which latter fact was well known to all the guardians." "Impaired health" is something that falls very short of permanent infirmity in the case of a man of forty-six years of age, who, so far as the evidence in the case is concerned, was never absent through illness from his duties as Master during the fifteen years he held the position, and who, at the time he ceased to hold office, was considered by the same guardians to be so physically and mentally fit for the position of Master that they not only passed a resolution, on 26th August, 1916, requesting the Local Government Board to reconsider their demand for his resignation, but also, two months later, appointed him to the position of temporary Master.

I am myself of opinion that, under the terms of the Union Officers Superannuation (Ireland) Act, 1865 (28 & 29 Vict. c. 26), sec. 1, the resignation or other cesser of office must be consequent on existing incapacity to discharge the duties of the office with efficiency by reason of permanent infirmity of mind or body or of old age, and we are all agreed that the discretion of the guardians to grant an allowance under the section upon the ground of infirmity can only be exercised after a judicial determination by them, first, that the officer in question was, at the date of his resignation or otherwise ceasing to hold office, incapable of discharging his duties with efficiency, and, second, that this incapacity was the result of infirmity of mind or body, and, third, that such infirmity was permanent.

We are also agreed that the guardians, prior to or at the date of their resolution of the 10th March, 1917, had no materials or evidence of any kind before them in reference to any of these matters, and that they did not, in fact, either consider or determine them. It has been suggested that, after an officer has resigned or been removed, a condition of bodily or mental disease might subsequently develop in circumstances which would justify the guardians in deciding that the disease was one of long standing, and existing at the date of the resignation, so as to entitle them to grant an allowance under the section. I asked the question as to what limit of time, short of the duration of the natural life of the officer who had resigned, was to be imposed upon the discretion of the guardians in granting an allowance

in such circumstances, but failed to elicit any satisfactory reply. The section itself, by the use of the words "upon his resigning." &c., seems to contemplate that, subject to the necessity for a month's notice, the grant of the allowance should be contemporaneous with the resignation, or at any rate within a reasonable period thereafter; but this question need not be considered in the present case, as it is transparently clear that no speculations of the kind had ever been considered or determined by the guardians before or at the time of their resolution of the 10th March, 1917, and that the case of permanent infirmity was an afterthought..

The resolution of the guardians granting the allowance was wholly ultra vires and without and in excess of jurisdiction, and, as the passing of a valid resolution was a condition precedent to the exercise by the Local Government Board of their jurisdiction to consent, it necessarily follows that their sealed order of the 22nd May, 1917, was a nullity. In fact, as I understand the argument addressed to us by counsel on behalf of the guardians and the Local Government Board, neither of these propositions was seriously contested, while counsel for Mr. Lunney informed us he had nothing to say. Counsel for the guardians based their opposition to the application substantially upon the grounds, first, that the grant of the writ, being within the discretion of the Court, it should not be allowed to issue, having regard to the absence, as alleged, of uberrima fides on the part of the applicants; and, second, that the resolution of the 10th March, 1917, and the sealed order of the 22nd May were purely ministerial acts on the part of the guardians and Local Government Board, respectively, to which the writ of certiorari had no application, while Mr. Wylie K.C. for the Local Government Board practically confined his argument to the latter contention.

The argument as to the necessity for uberrima fides rests upon the circumstance that in the affidavit in support of the conditional order no mention is made of the fact that out of the nine applicants before the Court six were themselves guardians, and, though present at the meeting of the 10th March, 1917, did not by vote or otherwise express any dissent from or protest against the resolution. I should be sorry, by any observation of mine, to weaken

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K. B. Dir. the authority of that most salutary principle which disentitles an applicant to relief if he has been responsible for the suppression of any material facts which were within his knowledge, and which it was his clear duty to bring before the Court, but we do not think we would be justified in acting upon or applying the principle in the facts of the present case. The affidavit in question was a joint one, sworn by the nine applicants, three of whom were not guardians, and, as to them it would, in our opinion, be a matter almost of course that, if the objection to the others was well founded, the conditional order should be amended by striking out the names of the other six; but it will be found that the affidavit in question discloses a full and complete history of the entire transaction, including an exhibit of the minutes of the meeting of the guardians of the 10th March, 1917, which set out the names of all the guardians present, including those of the six applicants. It also sets out the proceedings and guardians present at a subsequent meeting on the 2nd June, 1917, at which the following resolution was passed, and apparently unanimously:—"That this Board enters their protest to the decision of the Local Government Board that the late Master retired from permanent infirmity, as the Local Government Board know that he retired as the result of a sworn inquiry, and under the order of the Local Government Board." I find that only two of the applicants were present upon that occasion, so that, presumably, the others who voted with them have since crossed over to the enemy's camp. The resolution but emphasizes the want of candour in the clerk's answer to the query of the Local Government Board, and also discounts the suggestion in Mr. Gallagher's affidavit that the majority of the guardians were influenced by their knowledge of Mr. Lunney's impaired health. It must also be remembered that this affidavit was not used for the purpose of an absolute order, as to which the necessity for the fullest disclosure is evident, but merely for a conditional order, and, in view of this fact, and of the very full details in the affidavit, it is impossible to conclude that there was either a desire for, or any object in, the suppression of the fact, notorious to all the parties concerned, that these six gentlemen were present at the meeting of the 10th March, 1917. The fact that the letter of the 8th

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February was not produced nor read upon that occasion suggests *K. B. Div.*
 that the resolution was hastily and improvidently disposed of. 1918.
 In striking contrast to the attendance of guardians upon this
 occasion I find that on the 10th February seven were present, on
 17th February, eleven; on 24th February, four; on 3rd March,
 six; on 2nd June, five; and on 23rd June, five; so that the
 absence of dissent by the minority of six, in the face of an over-
 whelming majority, can readily be understood. Further, we
 must remember that the six guardians have but the slightest
 pecuniary interest in the application, while, on the other
 hand, the issue involved concerns the entire body of rate-
 payers, and gravely affects the purity and propriety of public
 administration.

The remaining question, as to the application of the remedy
 of certiorari to proceedings of this nature, is the only one which
 has occasioned any doubt or difficulty in the minds of the Court.
 The underlying principle is well established, that the remedy of
 this writ is not available in reference to acts of an administrative
 or ministerial character, but only for such as are judicial or quasi-
 judicial; but to so state it is *litem resolvere lite*, as the difficulty
 must always remain as to where to draw the line upon the facts
 of particular cases, especially in the application of the principle
 to the acts of public departments. It has been said, in some of
 the familiar cases on the subject, that the writ applies to all acts
 of public bodies which determine rights or impose liabilities, but
 I am of opinion that such a proposition is incapable of universal
 application, and should be limited to acts of the kind which
 necessarily require for their determination the weighing and con-
 sideration of evidence and consequent discharge of judicial duty,
 though I think it is also well settled that in the discharge of such
 duty public bodies are not limited to the strict methods of
 investigation which are applicable to purely judicial tribunals,
 but may adopt any method which results in an impartial and
 independent inquiry. Several of the cases cited in the course of
 the argument, all of which deal with acts of this particular public
 department, supply useful illustrations from the judgments of
 this Court and of the Court of Appeal as to the difficulty of
 formulating a more scientific definition than that which I have

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K. B. Div. ventured to suggest. In *Reg. (Wexford County Council) v. The*
 1918. *Local Government Board (Webster's Case)* (1), it was held by the
 R. Court of Appeal, reversing the decision of this Court, that the
 (BRYSON) Board in determining, pursuant to the provisions of the Local
 v. Board in determining, pursuant to the provisions of the Local
 LISNASKEA Government (Ireland) Act, 1898, the increase of remuneration for
 P. L. G. existing transferred officers in proportion to the increase of their
 ——— duties had based their decision on a wrong principle, and that a
 Sir James writ of certiorari should issue for the purpose of quashing it.
 Campbell C.J. Holmes L.J., in his judgment at p. 396, says, "that even where
 the Local Government Board is entrusted with duties of a judicial
 character, the discretion conferred is often so wide and absolute
 as to leave no place for the interference of any other authority";
 and observations of my own to a similar effect will be found in
R. (North Dublin Rural District Council) v. Local Government
Board (2), to which I refer later on; but Holmes L.J. goes on to
 say, "where the limits of the jurisdiction of the Board in judicial
 matters are defined by the statute that confers it, and these limits
 are transgressed, the writ of certiorari supplies a remedy." In
R. (William Pawley) v. Local Government Board (3), the Court
 of Appeal, affirming the judgment of Palles C.B. in this Court,
 directed the writ to issue for the purpose of quashing the order
 of the Board deciding that Pawley was not entitled to an old
 age pension, while, on the other hand, in *R. (Eustace) v. Local*
Government Board (4), it was held by the Court of Appeal, reversing
 the decision of this Court, that an order of the Board approving
 the order of their inspector confirming an improvement scheme
 under the Labourers (Ireland) Act, was merely a ministerial act;
 and to the same effect is the recent decision in *R. (North Dublin*
Rural District Council) v. Local Government Board (2) in reference
 to an order of the Board under the Towns Improvement (Ireland)
 Act, 1854, though in each of these two cases the substantial ground
 of the decision was the statutory finality of the orders impeached.

We are of opinion that the guardians in their determination
 to grant the allowance and the Local Government Board in their
 determination to consent were acting in a judicial or quasi-judicial
 capacity. They were deciding an important question of right, the
 right to a pension; they were imposing pecuniary liability upon

(1) [1902] 2 I. R. 349.

(3) [1910] 2 I. R. 440.

(2) [1917] 2 I. R. 454.

(4) 44 I. L. T. R., at p. 176.

the ratepayers, and their determination involved and required the consideration and decision of questions of status upon relevant and material evidence. The grant of a pension, to be effective, required the concurrent act of the two bodies, and it may well be that the resolution of the guardians, not being final in itself, could not be quashed, unless the order of the Local Government Board was quashed along with it; but we have no difficulty in this case in allowing the writ to issue for the purpose of quashing both orders, as we hold that the Local Government Board had no jurisdiction to give effect, by their consent, to a resolution which was itself without and in excess of jurisdiction on the part of the guardians, and, further, that they have no power to alter by their order of consent the amount as fixed by the guardians' resolution.

In *In re Hipperholme Constables* (1), where the order of the justices at sessions was purely formal, as a consequence of a previous resolution of a vestry, the Court allowed the writ to issue for the purpose of quashing both the resolution of the vestry and the order of the justices on the ground that the former being *ultra vires*, the latter must fall with it.

While fully recognizing the care and prudence with which the important duties entrusted to this great Department of State are generally discharged, we regret that, on this occasion, they should have surrendered the grave doubts they entertained as to the propriety of their decision to the desire to comply with the wishes of the guardians, more especially in circumstances which plainly demanded from them the most careful scrutiny and independent investigation. There is always a temptation to philanthropy when it can be exercised at the expense of other people, and the Local Government Board would be well advised fearlessly to exclude all considerations of popular sympathy, local pressure, or outside interference from any quarter, so calculated to prejudice against the public interest the impartiality and independence of their judgment in all matters in which obligation to decide lies upon them alone.

Solicitor for the prosecutors: *Michael E. Knight*.

Solicitor for the guardians: *B. Leslie Winslow*.

Solicitor for the Local Government Board: *James Mecredy*.

Solicitor for Thomas Lunney: *Henry Murphy*.

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Local Government—Public Health—Public Health (Ireland) Act, 1878
(41 & 42 Vict. c. 52), *sects. 2, 61, 66, 67, 68, 232, 233, and 279—Water*
rate—Cost of construction included in rate—Validity—Appeal—Grounds
of appeal—“Stated and specified.”

A water rate imposed, under sect. 66 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), on voluntary consumers of water, being in fact the price of the water supplied, necessarily has relation to the cost of production as well as of maintenance of the water supply. A water rate struck and assessed under this section can include a reasonable amount for discharge of capital expenses of construction.

Mayor of Worcester v. Droitwich Assessment Committee (2 Ex. D.) discussed and distinguished.

The provision in sect. 269 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), requiring the grounds of an appeal against a rate to be “stated and specified” in the notice of intention to appeal, is not a provision as to form only, but is of substance, and no ground is open on appeal unless it is stated in clear and unambiguous language in the notice, and in such a way that the respondent can be made aware of the points upon which the rate is impeached.

The respondents, as sanitary authority, struck and assessed a water rate under sect. 66 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52). The rate included a reasonable amount applicable to payment of capital charges and interest incurred in the cost of constructing the water works. The appellants, on whom the rate was assessed, in their notice of appeal stated as grounds of appeal, amongst others, the following:—1, that the rate was made without authority; and, 2, that the rate was made for purposes to which it was not legally applicable, namely, the raising of moneys which were properly raisable by a special poundage rate to be added to poor rate under sects. 232 and 233 of the statute. The court of appeal held that the second of these two grounds had not been established, but quashed the rate as being invalid because struck by a resolution not under seal.

On case stated, *held*, 1, that the first of the above two grounds was not “stated and specified” as required by sect. 269 of the statute, and that the court of appeal had no jurisdiction to hear or determine any objection as to the want of a sealed resolution; 2, that the second of the above grounds was sufficiently stated and specified, and that the rate was not invalid by reason of its including a sum applicable to payment of the capital expenses of construction.

(1) Before GIBSON, MADDEN, and KENNY JJ.

CASE STATED by His Honour the County Court Judge of the county of Sligo, on the hearing on the 19th, 20th, and 29th October, 1917, of two appeals against a water rate struck by the Sligo Rural District Council.

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By a sealed order of the Local Government Board for Ireland, made under the Public Health (Ireland) Act, 1896 (59 & 60 Vict. c. 54), sect. 5, sub-s. 1, and dated the 19th February, 1912, the Sligo Rural District Council were ordered to provide a water supply for Rosses' Point, which was situate in the district of which the council was the local sanitary authority; and by a subsequent sealed order of the same board, dated 22nd July, 1913, it was ordered that the Sligo dispensary district, so far as it was situated in the rural district of Sligo, should be the area of charge on which all expenses incurred or to be incurred for the purpose of providing the above-mentioned water supply should be charged.

At a meeting of the Sligo Rural District Council, held at Sligo on the 27th January, 1917, a resolution to strike a domestic water rate of 2s. 6d. in the £ for the purposes of the water supply to Rosses' Point (which supply was then in working order) was passed, and under that resolution the rate was assessed on all the premises in the townland of Rosses Upper which were supplied with the council's water. On the 14th June, 1917, demand notes were served on the ratepayers so assessed for the quarter commencing the 25th March, 1917, and on the 18th September, 1917, summonses were taken out by the council against sixteen ratepayers, of whom Gilbert Hanly was one. Two appeals, one by Gilbert Hanly, and the other by Gilbert Hanly and the other fifteen ratepayers, were taken and were heard at the Sligo Quarter Sessions on the 19th, 20th, and 29th October, 1917.

The two notices of appeal were identical, and the grounds of appeal therein stated were as follows:—

"1. The said rate is invalid, and is made and struck and assessed and sought to be levied without authority, and ought to be quashed.

"2. The appellants and other persons upon whom the said rate has been made did not enter into any agreements with

K. B. Div. the Sligo Rural District Council for the supply of water to
1918. their premises.

HANLY v. SLIGO R.D.C. “3. The said rate has been assessed upon persons to whose premises the Sligo Rural District Council do not supply water.

“4. The said rate has been struck for purposes for which it is not legally applicable, and for the purpose of obtaining moneys which the Rural District Council are not legally entitled to raise thereby, but which can be raised only as part of the poor rate by a special poundage rate to be added to the poor rate on the Sligo rural dispensary district, being the contributory place which the Local Government Board for Ireland have duly determined to be the area of charge for the special expenses incurred by the Sligo Rural District Council in respect of the construction of the works for and providing of a water supply within the said contributory place.

“5. The said rate is ultra vires, inequitable, unfair, and unreasonable.”

Having regard to the decision of the Court as to the sufficiency of these notices of appeal, only the material portions of the case as stated by His Honour are below extracted.

“*Mr. R. G. Leonard* appeared for the appellants, and *Mr. W. M. Jellett K.C.* for the respondents. The following facts were proved in evidence, or admitted at the hearing of the appeals:—The poor law valuation of the contributory area, namely the Sligo dispensary district, in so far as it is situated in the rural district of Sligo is £21,680 9s., and a rate of 1d. in the £ produced about £90. The waterworks for the supply of water to the contributory area were finished in the month of August, 1915. The total cost of the construction was £4,450, and the annual sum payable for interest and repayment of sinking fund on loans obtained by the respondents from the Board of Works and Provincial Bank for these waterworks is £337 2s. 5d., and the times when the loans will be repaid are twenty years for part of the loans and thirty years for the other part. The cost of supplying the water for the year from March, 1917, to March 25th, 1918, is £36 17s. 7d., consisting of three items—1, payment to caretaker of waterworks, £12; 2, poor rates paid by the respondents on the waterworks,

£16 17s. 7d.; repairing a breach which occurred in waterworks through an accident, £8 6s. 2d. A water rate of 2s. 6d. in the £ on the premises supplied with water by the respondents at the time the rate in question was made was estimated to bring in about £68, so that (and this was admitted by the respondents) the rate in dispute in this case of 2s. 6d. in the £, in addition to payment of cost of supply of water for the year was also intended to go in part relief of ratepayers in the contributory area for cost of construction. The contributory area or place comprises, and the water-pipes attached to these waterworks go through, and are, therefore, capable of being used for five townlands, viz.:—1, Teesan; 2, Rosses Upper; 3, Springfield; 4, Ballywelan; 5, Cregg. The respondents are the sanitary authority of the district in which the waterworks are situated, and in which the contributory place is situate.” [His Honour then set out the resolution of 27th January, 1917, and the fact that it was not sealed with the council’s seal.] “This is the only resolution dealing with the striking or making of the rate in question and the only resolution dealing in any way with the rate.

“The townland of Rosses Upper is in the contributory place, and all the premises supplied with water by the respondents on January 27th, 1917, are situated in the townland of Rosses Upper, except two premises or sets of premises situated in the townland of Cregg, which townland is also in the contributory place. No water rents have been agreed to or charged for the year in question for any water supplied in the contributory place. All the appellants have premises in the townland of Rosses Upper (except Eleanor Hunter, whose premises are in the townland of Cregg), and all of them are supplied with water by the respondents, and were so supplied on the 27th January, 1917. The annual value of the premises of some of the appellants does not exceed £10, within the meaning of sect. 72 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), which is incorporated with the Public Health (Ireland) Act, 1878, by and to the extent set out in sect. 67 of the latter Act.” [His Honour then set out the names of the appellants, with the respective annual value of their premises.]

“The appeals were brought under and pursuant to sect. 269 of the Public Health (Ireland) Act, 1878, which for brevity is

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K. B. Div. hereinafter referred to as 'the appeal section.' As the Court
 1918. held that only one of the grounds of appeal stated in the notice
 HANLY and argued before His Honour was open for his decision, it is
 r. sufficient to summarize shortly His Honour's decisions on the
 SLIGO R.D.C. points which the Court held were not open for decision. Mr. Leonard argued that the rate was invalid by reason of not being under seal, and that this objection was covered by the first ground stated in the notice. He further argued that the mere passing of the resolution was not the making or striking of a rate; that the rate was invalid, as being made applicable only to the townland of Rosses Upper instead of to all the premises supplied with water in the contributory place; and that the rate was also invalid because the resolution did not specifically mention the contributory place, and because several of the occupiers, the annual valuation of whose premises did not exceed £10 within sect. 72 of the Waterworks Clauses Act, 1847, had been rated instead of the owners as required by that section."

His Honour decided in Mr. Leonard's favour on the question as to the necessity for a seal, on the point raised as to the application of the rate to Rosses Upper only, and, in addition to the ground specifically dealt with in this report, decided against Mr. Leonard on the grounds as to the rate being invalid by reason of being the result of a resolution only, and by reason of rating occupiers of premises of an annual valuation not exceeding £10. His Honour held (with some doubt on the point as to the necessity for a seal) that these objections were covered by the first ground stated in the notice of appeal. Mr. Leonard at the hearing of the appeal abandoned grounds Nos. 2 and 3 on the notice.

The argument and decision on appeal material to this report related to the first point upon which the rate was attached in the argument—a point which His Honour held was covered by the fourth ground stated in the notice of appeal. The following are the material portions of the case stated which relate to this argument and decision:—

"For the appellants Mr. Leonard argued that the whole rate was invalid and should be quashed, because the rate of 2s. 6d. in the £ would admittedly produce a sum in excess of the cost of the

supply of the water for the year for which the rate was struck, and that there was only power under sect. 66 of the Act of 1878 and sect. 5 of the Act of 1896 to charge a rate for the cost of the supply of water, and no power to charge a rate for the cost of construction of the waterworks or which would include part of the cost of construction; and he referred to sects. 61 and 66 of the Act of 1878, sect. 5 of the Act of 1896, and analogous sections in the English Public Health Acts: *North Dublin Rural District Council v. Walsh* (1), hereinafter referred to as 'The Howth Case'; *Corporation of Worcester v. Droitwich Assessment Committee* (2); *Horn v. Sleaford Rural District Council* (3); *Rathdrum Rural District Council v. Saul* (4); *Northampton Corporation v. Ellen* (5). Mr. Jellett K.C., for the respondents, argued that the notice of appeal did not cover this ground, and referred to the appeal section, clauses 2 and 5 whereof require the notice of intention to appeal to state and specify the ground; and if the notice of appeal did cover this ground, he argued that under sect. 61 of the Act supply of water includes waterworks (sect. 61, sub-s. 1); and that it was perfectly lawful to charge a rate which would pay for more than the cost of supply or maintenance for the year, and he said that the Howth case decided this, and referred to the cases stated in the Howth case.

"I was and am of opinion that either Mr. Jellett's argument that cost of supply includes cost of construction is right or that—and this seems to me the real ground—as long as the respondents by their rate charge a fair and reasonable sum as the return or payment for the water supplied to each set of premises, it does not matter whether the total sum produced in a year by that rate exceeds the cost of supply or maintenance for that year, and includes part of the cost of construction or not; and I am of opinion, and so held on the evidence, that 2s. 6d. in the £ was a quite reasonable sum to so charge. It seems to me that there is a slight ambiguity in the use of the words 'cost of supply.' There is the cost of supply in making the original waterworks to supply water to the district, and there is a cost of supply or cost of supply and maintenance in

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(1) [1917] 2 I. R. 86.

(2) 26 Ex. D. 49.

(3) [1898] 2 Q. B., pp. 358, 368.

(4) 39 I. L. T. R., 270.

(5) [1904] 1 K. B. 299, at p. 315.

K. B. Div. each year. I should add that the point seems to me to have been
 1918. settled in the Howth case, as, if the two cases stated in that
 HANLY case are read, it will be seen that this very point was made: that
 v. all the money necessary for cost of supply for the year had been
 SLIGO R.D.C. provided for in the demand by the Rural District Council to the
 County Council; and the Court held that one part of the rate sued
 for in that case could be recovered."

His Honour, on the three grounds in which he found in favour of the appellants, quashed the rate. The case stated set out eleven questions for the opinion of the Court. Having regard to the decision, the only material one of these is the first, namely, "Was I right in deciding that the water rate was not made for purposes to which it was not legally applicable, nor for the purpose of obtaining moneys which the respondents were not legally entitled to raise thereby?"

The following are the material portions of the statutes referred to in the arguments and judgment:—

Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17):—

Sect. 70. The rates shall be payable in advance by equal quarterly payments . . . in Ireland at Christmas Day, Lady Day, Midsummer Day, and Michaelmas Day.

Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93):—

Sect. 3. Whenever any person interested complains to two justices that any reservoir constructed by the undertakers is in a dangerous state, such justices shall forthwith make inquiry into the truth of the complaint; or two justices on their own view, and without complaint by any person, may proceed under the present provisions as if a complaint had been so made to them.

Sect. 4. If on any such inquiry, the justices are satisfied that the complaint is well founded, and that the reservoir is in a dangerous state, and that the danger is so imminent as not to admit of delay in removing the cause of complaint, they shall order such person as they think fit to enter on the property of the undertakers, and to lower the water in the reservoir, and to execute and do all such works and things as the justices think requisite and proper for removing the cause of complaint.

Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52):—

Sect. 2. "Waterworks" includes streams, wells, pumps, reservoirs, cisterns, tanks, aqueducts, cuts, sluices, mains, pipes, culverts, engines,

and all machinery, lands, buildings, and things for supplying or used for supplying water; also the stock-in-trade of any water company. *K. B. Dw.*
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Sect. 61. . . . Any rural authority may provide their district or any contributory place therein, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes, or any of them, may (1) construct and maintain waterworks . . . ; (2) take on lease or hire any waterworks and (with the sanction of the Local Government Board) purchase any waterworks or any water or right to take or convey water, either within or without their district, and any rights, powers, and privileges of any water company; and (3) contract with any person for a supply of water. *SLIGO D.C.*

Sect. 66. Where a sanitary authority supply water to any premises they may charge in respect of such supply a water rate to be assessed on the net annual value of the premises to be made, assessed, and levied in like manner in every respect as the rate out of which the expenses incurred by such sanitary authority in the execution of this Act are defrayed; moreover, they may enter into agreements for supplying water on such terms as may be agreed on between them and the persons receiving the supply, and may recover water-rents or other moneys payable under such agreements in a summary manner.

Sect. 68. A sanitary authority may agree with any person to supply water by measure, and as to the payment to be made in the form of rent or otherwise for every meter provided by them. . . .

Sect. 232. The expenses incurred by a rural sanitary authority in the execution of this Act shall be divided into general expenses and special expenses. . . . Special expenses shall be the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing a supply of water to any such place. . . . Special expenses shall be a separate charge on some contributory place or places. The following areas situated in a rural sanitary district shall be contributory places for the purposes of this Act; that is to say (1) the dispensary district; (2) the electoral division; (3) the townland; (4) such portions of any townland or townlands as may be determined by the Local Government Board. Provided that the Local Government Board shall have power to determine on what area of charge being a contributory place, or consisting of contributory places, any special expenses shall be chargeable, whether incurred after the passing of this Act, or still due in respect of works executed before the passing of this Act.

Sect. 233. For the purpose of obtaining payment for special expenses from the several contributory places within its district the board of guardians, being the rural sanitary authority, shall levy the same as part of the poor rate by a special poundage rate to be added to the poor rate on such contributory place or places and to be collected therewith and recoverable in the same manner and with the same remedies by collectors of the poor rate and lodged

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to the credit of the guardians with the treasurer of the union; and the expenditure thereof shall be brought to account in such form and manner as the Local Government Board shall from time to time by any general order direct; and if not otherwise directed by such general order, the sums levied by such special poundage and placed to the credit of the board of guardians shall be applied by them in discharge of the special expenses incurred as aforesaid on account of such contributory places respectively.

Sect. 269. Where any person deems himself aggrieved by any rate made under the provisions of this Act, or by any order, conviction, judgment, or determination of or by any matter or thing done by any court of summary jurisdiction, such person may appeal therefrom, subject to the conditions and regulations following.

Sub-s. 1. The appeal shall be made to the next court of quarter sessions for the county, division, or place in which the cause of appeal has arisen, holden not less than twenty-one days after the demand of the rate or the decision of the court from which the appeal is made.

Sub-s. 2. The appellant shall, within fourteen days after the cause of appeal has arisen, give notice to the other party and to the authority or court of summary jurisdiction by whose act he deems himself aggrieved of his intention to appeal and of the ground thereof.

Sub-s. 5. On appeals under this Act against any rate the chairman of the court before which such appeal shall be brought shall have power to hear and finally determine the matter of any appeal brought before him under this Act, and shall make such order thereon as to him shall seem meet. . . . Provided always, that the chairman to whom such appeal shall be made shall not examine or inquire into any other cause or ground of appeal than such as is stated and specified in the notice of appeal, nor alter any such rate with respect to other persons or matter than are mentioned and specified in the notice of appeal. . . . The person so appealing shall give or cause to be given at least fourteen days' notice in writing of his or her intention of appealing as aforesaid, and the matter or cause thereof, to the clerk of the sanitary authority, and the chairman upon the hearing of such appeal shall not examine or inquire into any other cause or ground of appeal than such as is stated and specified in the notice of appeal.

Public Health (Ireland) Act, 1896 (59 & 60 Vict. c. 54):—

Sect. 5, sub-s. 1. Where a sanitary authority under the provisions of the principal Act supply water in any urban district or in any contributory place, and an application is made to them by any ten persons rated to the relief of the poor in any such urban district, or by any five persons so rated in such contributory place, to charge water rates or water rents in respect of the water so supplied, it shall be incumbent upon the authority to exercise the powers given to them by the principal Act of charging water rates or water rents in respect of all water supplied by them in such urban district or in such contributory place.

Sect. 15, sub-s. 1. When complaint is made to the Local Government Board that a sanitary authority has made default . . . in providing their district with a supply of water, in cases where danger arises to the health of the inhabitants from the insufficiency or unwholesomeness of the existing supply of water, and a proper supply of water can be got at a reasonable cost . . . the Local Government Board, if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of the complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus, or the Local Government Board may appoint such person to perform such duty, and shall by order direct that the expenses of performing the same, together with a reasonable remuneration to the person appointed for superintending such performance, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the authority in default.

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SLIGO RURAL DISTRICT C.

Jellett K.C. (with him *Carson*), for the Sligo Rural District Council:—

Sect. 269 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), requires the grounds of the appeal to be stated and specified. Here five grounds of appeal were stated in the notice, but none except the fourth is specific. The section intends that the ground of appeal shall be so stated that there can be no mistake as to the exact matter in issue. Under the section and on the authorities the only ground open for the consideration of the County Court Judge and of this Court is the fourth ground, namely, that the rate is bad because it is struck for a purpose to which it is not legally applicable: *R. v. Oxford Justices* (1); *R. v. Sheard* (2); *R. v. Bromyard* (3); *Reg. v. London Justices* (4); *Horn v. Skeaford* (5); Halsbury, Laws of England, vol. xxiv, p. 62, par. 117; Ryde on Rating, p. 121.

[Per curiam. We will hear you in argument on the fourth ground only, and unless the appellants can establish that any of the other grounds were open on their notice, we will not require them to be argued on behalf of the council.]

“Waterworks” are defined by sect. 2 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52); construction and

(1) 1 B. & C. 279.

(2) 2 B. & C. 856.

(3) 8 B. & C. 240.

(4) [1897] 1 Q. B. 433.

(5) [1898] 2 Q. B. 358.

K. B. Div. maintenance are both included in the "supply of water" in sects. 61
 1918. and 66 of that statute, and the latter section is intended to throw
HANLY on voluntary consumers of the water a special rate, just as sect. 232
v. throws on all the ratepayers of the contributory place, whether
SLIGO R.D.C. consumers of water or not, a compulsory rate. "Maintenance" cannot be confined in theory or in fact to particular repairs; it prima facie relates to the whole undertaking of the water supply, and it is just that the consumers of water, who derive a special benefit from the water they voluntarily take, should contribute by the water rate to ease the burden imposed by the compulsory rate under sect. 232: *Rathdrum Rural District Council v. Saul* (1). When the sections of the statute are read together, their reasonable and natural intention is that a reasonable amount can be included in the water rate as payment towards capital expenses. The authority relied on against this contention is the *Mayor of Worcester v. Droitwich Assessment Committee* (2); but that case was decided on a statute containing provisions different from our statute, and has been distinguished by Kennedy J. in *Horn v. Sleaford Rural District Council* (3). The latter decision is an authority of greater weight, as it is on sections of the English Public Health Act which are very analogous to the sections of our statute, and the decision in *Mayor of Worcester v. Droitwich Assessment Committee* (2) is not approved of by Mr. Lumley, 1908, vol. i, p. 130, or in Ryde on Rating (1912 ed., p. 377). The latter author states that in his opinion the decision is inconsistent with those of later authorities, such as *West Bromwich School Board v. Overseers of West Bromwich* (4) and *R. v. School Board of London* (5) (Ryde on Rating, 1912 ed., p. 380); while Mr. Lumley (ed. 1908, vol. 1, p. 130) states that the opinion of the Local Government Board in England is that "the cost of a scheme of water supply may, and should as far as practicable, be thrown upon the consumers of water by the levy of water rates." The cases stated in the two *Howth Cases* (6) show that there the whole of the estimated cost of the water supply was included in the demand on the county council.

(1) 39 I. L. T. R. 270.

(5) 17 Q. B. D. 738.

(2) 2 Ex. D. 49.

(6) Unreported and [1917] 2 I. R.

(3) [1898] 2 Q. B. 358, at p. 369.

86.

(4) 13 Q. B. D. 929.

R. G. Leonard, for the appellants:—

Sect. 61 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), deals with water supply to the district, and includes the cost of construction; but sect. 66 of that statute refers to supply of water to individual premises, and does not include the cost of collecting the water. If the council wish to relieve the ratepayers of the compulsory rate assessed under sect. 232, they can do so by water rents fixed by agreement. Sect. 229 of the English Public Health Act of 1875 (38 & 39 Vict. c. 55) is different from sect. 232 of our statute, as it contains the words "in and so far as the expenses of such supply and works are not defrayed out of water rates or rents under this Act"—words which are omitted from the analogous provisions of the Irish statute. These words imply that the cost of construction under the English statute can be included in the water rate; but the omission of these words in our later statute gives rise to the contrary implication. Sect. 229, with this natural difference, is the foundation of the judgment of Kennedy J. in *Horne v. Sleaford R. D. C.* (1), and that case is consequently no authority on the point here in question. *Mayor of Worcester v. Droitwich Assessment Committee* (2) was decided upon sections of the English Public Health Act of 1848 (11 & 12 Vict. c. 63) which are closely analogous to the sections of the Irish statute of 1878 (41 & 42 Vict. c. 52), and is a direct authority in favour of the appellants. The profit from a water rent is distinguishable from the amount received from a water rate; there is no doubt that the profit from a rent may be applied in reduction of the capital cost. If there is any unexpected surplusage from the water rate, it is not applicable towards capital expenses, but towards the reduction of the rate for the ensuing year. If the rate here is valid, it would result in there being two rates assessed for the same purpose. The English statute of 1875 (38 & 39 Vict. c. 55) differs from the Irish Act of 1878 (41 & 42 Vict. c. 52), in that under the Irish statute the Local Government Board can not only define special expenses, but can also fix the contributory area. As to the sufficiency of the notice of appeal, the appellants had no knowledge of the terms of the resolution when the appeal

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(1) [1898] 2 Q. B. 358.

(2) 2 Ex. D. 49.

K. B. Div. was lodged; the notice of appeal was consequently and of necessity in some respects a "shot in the dark." The real test is whether any injustice has been done by the framing of the notice; the notice should not be passed and construed in the strict way in which such matters were dealt with in the days of scientific pleading and at the date when the authorities cited, such as *R. v. Sheard* (1) and *R. v. Bromyard* (2), were decided. The council were aware of their statutory authority; and it is submitted that the first ground of appeal, i.e. that the rate was struck without authority, implying as it does, "without statutory authority," raised the question as to the necessity for a seal. The second ground of the appeal is probably irrelevant, and the third could not be pressed; but it is submitted that the points as to there being no seal, and that relied on in the notice, were properly open to the Court below and are properly open here for decision.

Carson in reply :—

In *Mullingar Rural District Council v. Rowles* (3), Palles C.B., at p. 51, treats water rates as the same in result and application as meter payments, and it is admitted that the money derived from meters could be applied in reduction of capital expenses. In *Mayor of Limerick v. Nash* (4), Ross J. says (p. 204, foot-note): "The costs of supply would, in all common sense, appear to include all expenses of providing the water, of bringing it in the mains to the neighbourhood of the houses, and the expenses of connexion."

Cur. adv. vult.

GIBSON J. :—

There are two questions for decision. The first is whether the notice of appeal, of the 27th June, 1917, sufficiently stated and specified the grounds of appeal as required by sect. 269 of the statute of 1878, c. 52. We are of opinion that it did not, save as to the fourth ground, which has been fully argued, and which we shall dispose of. The authorities cited: *R. v. Sheard* (1); *R. v. Bromyard* (2) (where the rate was vulnerable on its face); *R. v.*

(1) 2 B. & C. 856.

(2) 8 B. & C. 240.

(3) [1913] 2 I. R. 44.

(4) 2 N. I. J. R. 203.

Derbyshire (1); *R. v. London* (2) are conclusive in principle. To these I may add *R. v. Pixley* (3), which is in point as to the present notice. The Act of 1848, c. 63, sect. 135, required only a written statement of the grounds of appeal. In adding the word "specified" in sect. 269, the subject of the decisions, the statute must be taken to adopt the authorities on that phraseology. It might have been in the interest of the rural district council to waive the objection, so as to enable the rate, if invalid, to be quashed and replaced by a new valid rate, and thus avoid the rate being resisted piecemeal if the grounds of objection would be a defence to proceedings to enforce the rate, as to which I abstain from any opinion. As Mr. Leonard frankly stated, the notice of appeal was a shot in the dark with unknown possibilities. When the contents of the shot were disclosed, Mr. Jellett was taken by surprise, and we must deal with the case as it stood when the appeal below was heard.

A further possible objection relating to the competence of the appeal was thrown out by the Court during the argument. It is that the appeal might be too late. Sect. 269 specifies two subjects of appealable grievance—first, the rate; secondly, any order or determination by any court of summary jurisdiction, as to which latter class, see *Elliott v. Russell* (4). Sub-s. 1 defines the appeal court of Quarter Sessions; sub-s. 2 requires notice of appeal to be given within fourteen days after the cause of appeal has arisen. If the making of the rate constitutes the cause of appeal, the fourteen days' limit might apply, though the rate was not published as the Act of 1848, c. 63, formerly required and as many other statutes require. The inconvenience of hanging up a rate in suspense is strikingly illustrated by this case, and the delay would be mischievous if a new rate should be found to be necessary. This possible hardship from want of public notice occurs in other legislation and in our valuation code. A curious example of difficulty resulting from want of knowledge is *R. v. Boulton* (5), where an appeal failed because it did not rely on an objection to the conviction, of the form of which the appellant was unaware,

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(1) 6 A. & E. 893.

(2) [1897] 1 Q. B. 433.

(3) 4 Q. B. 711.

(4) [1902] 2 K. B., at p. 754.

(5) 4 A. & E. 498.

K. B. Div. as it was drawn up after his appeal was served. The Legislature
 1918. may have assumed that consumers would make inquiries and
 HANLY ascertain for themselves about the rates for the supply they
 SLIGO R.D.C. were using, or that the local authority would notify, if found
 v. necessary, the making of the rate without being commanded to
 Gibson J. do so. As this point was not argued, I do not now propose to
 deal with it.

I take up the question argued as properly before us for decision, whether under sect. 66 of the statute of 1878 a water rate, reasonable in amount, can be assessed with the intention of charging ratepayers of the supplied area in respect of cost of construction. Mr. Leonard contended that the water rate must be confined to maintenance, a term the extent of which he did not attempt to define. The problem depends on the construction of sect. 66, read in its context and subject to the financial provisions contained in sects. 232 and 233. I propose first to consider the relevant legislation, and then to discuss the Irish and English authorities bearing on the subject.

The enactments directly requiring consideration are, in addition to the statute of 1878, sects. 44, 53, and 70 of the Act of 1847, the Act of 1863 (as to reservoirs becoming in a dangerous state), and the Act of 1896, c. 54, sects. 5 and 15. I have also examined the statute of 1848, c. 63, on which the *Mayor of Worcester v. Droitwich Assessment Committee* (1) was decided; it presents the original legislation from which the present statutes have been developed. The statutes of 1866, c. 90, and 1874, c. 93, are discussed by Palles C.B. in *Malton v. West* (2).

Sect. 66 of the Act of 1878 only conferred a power, which, by sect. 15 of the Act of 1896, was made, in certain cases, an obligation, to provide with a supply of water for public and private purposes; it enabled the local authority to construct and maintain waterworks and to hire and purchase waterworks. The power of construction was limited by sect. 62, if there was a water company within the district able to supply the necessary water. Where waterworks are constructed or purchased, sect 65 requires a supply of pure and wholesome water to be supplied.

(1) 2 Ex. D. 44.

(2) I. R. 11 C. L. 525.

The rating authority is the rural district council. The following points on sect. 66 require attention. The verb "to supply" includes construction and maintenance: *Jones v. Conway* (1); and prima facie the water supplied is the produce of expenditure on the works and on communication pipes. Until the Act of 1896, c. 54, sect. 5, there was no obligation to rate. Persons in the district normally were free to take or not take water. No maximum amount of rate was prescribed, such as is found in some statutes, e.g. *Woking Water Co. v. Parker* (2); the matter was entrusted to the discretion of the council, which would, so far as reasonably practicable and financially fair, make the charge low in order to get consumers to take the water: *Horn v. Sleaford Rural District Council* (3) (where see the judgment of Wills J.). The water, the subject of the rate, was to be for domestic purposes, an expression the meaning of which is discussed in cases in the House of Lords, 1912 and 1914, and in [1914] 2 Ch. 734. In addition, the council might enter into agreements for supply of water at a rent, and, under sect. 68, might supply water by measure. In both these latter cases Mr. Leonard admits that the charge might include the cost of providing the supply. If attention was confined to the sections from 61 to 68, I should be of opinion that the water rate in respect of the supply of water (for which construction as well as maintenance was required), left, as to amount, to the discretion of the local authority supposed to act reasonably, might cover cost of constructing as well as maintaining. What maintenance may include is uncertain. The statute of 1863 provides for the case of the reservoir getting into a dangerous state. Between the reservoir and the communication pipes, both forming part of a single installation, it is difficult to draw any distinction. Would not the repair of all be part of maintenance? The charge, under sect. 66, is not for supply, but "in respect of such supply," an expression of wider import, introducing considerations affecting the genesis and character of the supply. In *Malton v. West* (4) the enlarging effect of these words is pointed out.

The initial installation and its maintenance would seem legitimate factors to influence the amount of the water rate,

(1) [1893] 2 Ch. 603.

(3) [1898] 2 Q. B. 358.

(2) [1916] 1 K. B. 433.

(4) 1. R. 11 C. L., at pp. 532 and 533.

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K. B. Div. representing as it were the price of the water supplied. Sect. 5 of our statute of 1896, c. 54, amending the Act of 1878 (as sect. 10 of the Act of 1878, c. 25, amended the corresponding provisions in the English Act of 1875), supplies a weighty argument. The imposition of a water rate was, under sect. 66 (sect. 56 of the English Act of 1875), discretionary, while the special expenses poor rate, under sects. 232 and 233, was obligatory. The object of sect. 5 of the statute of 1896 was to enable ratepayers, compulsorily assessed under sects. 232 and 233 for waterworks from which they might be deriving no personal benefit to compel the imposition of a water rate on consumers and thus obtain contribution, which would relieve, to some extent, in respect of the expenses which were or would have been included in the compulsory assessment for special expenses. If this view of sect. 5 is correct, the water rate represents in part the special expenses provided for in sect. 232. Sect. 56 of the English Act of 1875 and our sect. 66, each amended in the same way, must receive the same construction. On the English enactment *Horn v. Sleaford Rural District Council* (1) is an authority. The corresponding Scotch statute of 1891, c. 52, is framed so as to exclude the present controversy.

Sects. 232 and 233 are relied upon as making such construction of sect. 66 inadmissible. The words, however, "providing a supply of water" in sect. 232 must include (as the same expression does in sect. 61) maintenance, as appears from the fourth clause of sect. 232, which speaks of construction and maintenance. If all expenses of construction and maintenance are to be borne exclusively by the special expenses compulsory rate, what is the water rate or rent to cover? If it can take into account maintenance, it must logically be influenced also by capital expense. The Irish authorities support this construction. In *Scovell v. Gardiner* (2), FitzGerald J. describes a water rate as the price of the water supplied for which full value is given and received. In *Rathdrum Union v. Saul* (3) all the expenses and interest were included in the demand on the county council, but the water rate was described as being for the special advantage of those using the water. The same situation arose in the first *Howth Case* (4).

(1) [1898] 2 Q. B. 358.

(2) 16 I. C. L. R., at pp. 348, 349.

(3) 39 I. L. T. 270.

(4) Unreported.

In the *Mayor of Limerick v. Nash* (1), Ross J. expressed the view I adopt. There are also two important cases in 1913. In the *Postmaster-General v. Nenagh Urban District Council* (2), Ross J. assessed the value of the water supplied at £5, on the basis that it was the fair return for the water supplied, a figure quite inconsistent with Mr. Leonard's proposition that the water rate could only be for maintenance works. In *Mullingar Rural District Council v. Rowles* (3), it was held that the rate was the price of the water on which there could be a profit assessable to income tax. On the actual decision that there was a profit liable to income tax in that case I offer no opinion. If the proceeds of the rate were applicable to go in relief of a rate under sect. 232, and were, as public money, impressed with a trust for that purpose (as to which there are many decisions), there would have been no surplus assessable as profits under schedule D. The case was not disposed of on that basis. Its value in the present controversy is that no question was suggested that the rate or rents were in any way improper, as the rate would have been if Mr. Leonard's argument before us was correct. The chief other Irish case that need be noticed is the *North Dublin Rural District Council v. Walsh* (4), where the Court adopted the contention of Mr. Jellett for the council that the rate was in the nature of payment for the article supplied, and that there could be a valid rate by resolution without a rate book. In the previous case between the same parties it appeared that all expenses of the water supply were included in the demand note to the county council to be added to poor rate. The appeal sect. 269, and sects. 100, 106, and 135 of the statute of 1848 were not referred to. The case must, of course, be accepted as a binding authority upon what it decides. Its importance here is the view taken of the nature of a water rate.

The above authorities all point to the conclusion that the rate may legitimately be assessed in respect of the water actually supplied, and that it cannot be restricted to the mere cost of maintenance on the assumption that the water is to be a gratuitous supply without regard to the cost of getting it and bringing it to

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(1) 2 N. I. J. 203.

(2) [1913] 1 I. R. 238.

(3) [1913] 2 I. R. 44.

(4) [1917] 2 I. R. 86.

K. B. Div. the consumers' service pipes. I am of opinion that the water
 1918. rate, like the water rent, may have regard to the cost of produc-
 HANLY tion within reasonable limits. The amount is entrusted to the
 v. reasonable discretion of the local authority without any defined
 SLIGO R.D.C. maximum, it being their duty, as well as their interest (in order to
 Gibson J. induce customers to take the supply), to make the charge moderate.
 The relation between the water rate under sect. 66 and the special
 rate under sect. 232 inter se is not specified in the Act and must
 be collected from inference based on legal principle. The proceeds
 of each rate are dedicated to a special purpose. The objects
 of each rate to some extent overlap. I think that rents under
 sects. 66 and 68 must go, if there is a surplus, in reduction of
 the assessment under sect. 232, when the proper time arrives (as
 Mr. Leonard admits), and the same principle extends to the water
 rate proper. The funds are ear-marked with a trust: *Attorney-
 General v. Aspinall* (1); and must be applied in accordance with
 the manifest obligation of consumers to ease the burden on those
 derivatively liable. Whatever the word "maintenance" may
 cover, whether a leak or burst in the reservoir or pipes or other-
 wise, it would fall within sect. 232 and could hardly be excluded
 from the water rate, so that two funds are created with the same
 end. The water rate is a prospective quarterly rate under sect. 70
 of the statute of 1847, c. 17. The estimate referred to in the case
 is not before us, and I do not know how it was proved. No
 prospective rate could be accurately assessed, having regard to
 possible contingencies; any casual surplus at the end of the year
 would be plainly applicable to reduce the capital debt and interest;
 it could not be mixed up with the general revenue of the district
 council.

I now turn to *Mayor of Worcester v. Droitwich Assessment Com-
 mittee* (2), pressed as deciding that sect. 66 is a purely main-
 tenance provision. The judgment of Mellish L.J., questioned in
 Mr. Lumley's work at p. 131, and in Ryde on Rating, relates
 to the statute of 1848, c. 63, materially different from our
 enactment. Sect. 93 made the imposition of a water rate
 compulsory. It was to be assessed by the same local authority
 as fixed the other rates. The judgment states that under sect. 93

(1) 2 M. & C. 618.

(2) 2 Ex. D. 49.

there must be an estimate of the sum actually required for maintenance of the waterworks, and that the levy cannot be for a larger sum than is required. I doubt if the language was intended to apply to such a question as that before us. Sect. 86 provides for a special district rate. Sect. 93 charges the rate on the occupier, but does not use the wide expression "in respect of." Sect. 98 requires an estimate for specified rates, not mentioning water rate. Sects. 100 to 106 deal with the rate books, &c. (as to which see *Reg. v. Workson Local Board* (1). Sects. 107 and 119 refer to mortgage of rates for expenses of works of a permanent nature (which include waterworks). Sect. 113 prescribes a sinking fund. Sect. 135 gives an appeal from rates. On this statute I should be unable to concur with Sir George Mellish if he meant that the prospective water rate could not take into account the initial cost and the necessity of feeding the sinking fund. In any case his view, questioned by Mr. Lumley and not in accordance with the opinion of the English Local Government Board, does not govern the construction of the statute of 1875 considered in *Horn v. Sleaford Rural District Council* (2). The judgment of Kennedy J. discusses *Mayor of Worcester v. Droitwich Assessment Committee* (3). The decision, if our statute was the same, would support the present rate. The opinion of Wills J. was based on broad grounds, and his reasoning helps my view. He treats the consumer as buying the commodity which he takes as voluntary purchaser. The argument was that the whole of the expenses there in question should be borne exclusively by the water rate, while the contention before us is that none of such expenses should be put on water rate. Why the limitation of special expenses in sect. 229, "if and so far as the expenses of such supply and work" (on the context including maintenance) "are not defrayed out of water rates or rent under this Act" is omitted from sect. 232 I do not know—whether from desire for concise drafting and because the clause was considered unnecessary, or to exclude the idea that the water rate was to be the primary fund for payment of expenses. Whatever was the intention, the omission from sect. 232 cannot have the effect of making the English and Irish water rates radically different, as it would have

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(1) 5 B. & S. 951. (2) [1898] 2 Q. B. 358. (3) 2 Ex. D. 49.

K. B. Div. if our water rate was to be struck regardless of expense of supply.
 1918. We must construe our own statute as it stands. Had it been
 HANLY desired to differentiate the two rates in such a fundamental
 v. particular, the intention would have surely been expressed in
 SLIGO R.D.C. clear affirmative language. The construction of our enactment
 Gibson J. cannot be changed because a clause in an English statute is not
 reproduced. The clause in sect. 229 assumes that the cost of
 construction was already included in sect. 56; it does not put such
 cost into it as a new thing.

Assuming that the prospective water rate before us was assessed so as to produce a small reasonable contribution to the sinking fund in respect of the supply, and without deciding how and when such contribution, if at the end of the year there is a surplus after providing for actual local expenses, should be credited or applied, I am of opinion that the rate was not invalidated by such method of assessment. The Irish authorities support such a conclusion, and, indeed, unless and until overruled, appear to require it. We do not decide as to any of the other grounds dealt with by the judge, as they were not open for him to determine.

MADDEN J. :—

The establishment in any locality of a system of water-works under the provisions of the Public Health (Ireland) Act, 1878, results in the establishment of two distinct rates.

There is a rate created to bear the expenses of the construction of the reservoirs and other works necessary for the providing of a supply of water. This expense is a charge on the electoral divisions included as the district which has been constituted the contributory area, and is levied and collected as part of the poor rate by the county council under sect. 6 of the Local Government (Ireland) Act, 1898. It is considered just that all the rated inhabitants of the contributory area should contribute to the establishment of a system from which they all derive benefit directly by the introduction into the neighbourhood of improved sanitary conditions, and, more remotely and potentially, by the privilege which they all enjoy of connecting themselves with the system, and obtaining a supply of water to their houses for domestic or other purposes.

The second rate, that with which the present case is conversant, is levied by the rural sanitary authority on persons actually making use of the water. These persons derive special benefits from the water supply, and it is manifestly just that they should, over and above their contribution through the poor rate to the general purposes of the system, pay for the special advantages which they derive from the water supply, in the form of a special rate. This rate is struck by the rural sanitary authority under the 66th section of the Act. This authority, as was held by the Court of Appeal in the *Rathdrum Rural District Council v. Saul* (1), is the district council.

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The 66th section provides that "when a sanitary authority supply water to any premises they may charge in respect of such supply a water rate to be assessed on the net annual value of the premises." That the supplying of water in return for a rate as the price of the water supplied is of the nature of a sale was clearly stated in *Glasgow Corporation Water Commissioners v. Milton* (2), adopted and applied to the Public Health Act of Ireland by this Court in *Mullingar Rural District Council v. Rowles* (3):—"I consider that it is trading, notwithstanding that there is a limited class who alone are permitted to purchase the water, should they so desire, and notwithstanding that the price is one that has been fixed by Parliament or otherwise, or that the rate has been fixed by one of the parties only, because the other party need not apply for the water unless he is willing to pay that price. The essence of trading in this sense is buying and selling—that the property is a subject-matter passing from one person to another in consideration of a price to be paid by that other. The property in the water in the present case passes, and the amount of the rate is its price, and is to be paid to the district council by the person who gets the water. . . . There, therefore, is everything necessary to constitute a sale."

The money received by the district council, whether it is fixed by the parties by agreement or is the amount of a rate, is, in either case, the price of the water. This price, however fixed, must be applied by the district council in precisely the same

(1) 39 I. L. T. R 270.

(2) 13 Cl. of Sess. Cases, 4th ser., pt. ix, p. 469.

(3) [1914] 2 I. R. 44.

K. B. Div. way, and in accordance with the statutory rights of the persons
1918. interested; and there is no foundation for Mr. Leonard's
HANLY suggestion that the amount fixed by agreement can be dealt with
v. in a different manner from the price realized by means of a rate.
SLIGO R.D.C.

Madden J.

If the transaction has any of the characteristics of a sale, the vendors are clearly entitled to apply the price of the article sold in reduction of the expense of supplying it to the customer. Indeed these are the words of the 66th section. The charge by rate, where water is supplied to any premises, is to be "in respect of such supply."

Now, before water can be supplied the initial cost must be incurred of acquiring the requisite water rights, of constructing a reservoir to retain the water, and of providing service pipes as a means of communication between the reservoir and the premises. These expenses are an essential and necessary part of the costs of providing the supply of water. There is also the continuous expense of maintaining the works so constructed in proper working order. As against the validity of the rate before us it is contended that the special rate under sect. 66 is applicable to the latter purpose only, and that the rate in the present case is invalid, inasmuch as it is in part applied in payment of the interest and sinking fund in respect of money borrowed for the construction of the works. Having regard to the fact that the rate under sect. 232 falls on the ratepayers in the entire contribution area, while the rate under sect. 66 falls only on the limited number of persons purchasing the water, a question might arise as to the reasonableness of a rate which puts upon the latter class an undue proportion of the initial cost of the construction of the system. But no such question arises in the present case. The point for decision is whether it is fatal to the validity of the rate that it is struck for the purposes of paying, to any amount, however small, expenses over and above the cost of maintaining the works.

There is nothing in either the 61st or 66th section of the Public Health Act to support the contention that the district council, in applying the moneys received on foot of the special rate, are restricted to any particular portion of the cost of production. Indeed Mr. Leonard's argument rested, not so much on

an examination of the provisions of the Act, as upon the decision of the English Court of Appeal in the *Mayor of Worcester v. Droitwich Assessment Committee* (1). That case decided that in rating waterworks occupied by a local authority, who were restricted by statute from charging more than sufficient to enable them to maintain the waterworks, the local authority could be assessed only with reference to the profit actually earned. In the judgment of Mellish L.J. this passage is found:—"With respect to the first question, we think that the corporation in making a water rate under sect. 93 of the Public Health Act are bound to make an estimate of the sum they actually require for the maintenance of their waterworks, and cannot legally levy a larger sum by a water rate than the sum they so require." I do not agree with the contention that what Lord Justice Mellish says, as to the limit of the application of the rate, is a mere dictum. If it were, it would be entitled to the highest respect; but it is the very foundation of the decision. It is also said that the authority of the decision in this case had been questioned. But that was in its bearing on the law of rating; as a decision on the 93rd section of the Public Health Act then in force—the Act of 1848—it has never been questioned.

The important matter is, that when the section upon which the judgment is based is examined, it will be found to be essentially different from the provisions of the Public Health (Ireland) Act, 1878, relating to water rates. It begins with the words: "Whenever and as long as any premises are supplied with water by the local board of health, for the purposes of domestic use, cleanliness, or drainage, they shall make and levy, in addition to any other rate, a water rate upon the occupier." There is no section in the statute analogous to sect. 66 of our Act of 1878. Mellish L.J. speaks of this rate as one "for the maintenance and repair of the waterworks," and it is so treated in the argument of the case. This being the purpose for which the board of health acquired statutory power to impose the rate, they had no power to apply it to any other purpose. No question was considered in the case as to the possibility of applying it in reduction of capital charges.

(1) [1876] 2 Ex. D. 49.

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v
SLIGO R.D.C.
Madden J.

K. B. Div. The decision of the Court of Appeal was considered by the
 1918. Court of Queen's Bench in England in *Horn v. Sleaford Rural*
 HANLY *District Council* (1). The question in that case arose upon the Public
 v.
 SLIGO R.D.C. Health Act of 1875, the statute upon which our Public Health Act
 of 1878 is founded; sect. 56 corresponding to sect. 66, and sect. 229
 Madden J. to sect. 232.

In that case it was contended that it was incumbent on the rural district council to repay the instalments of principal and interest on the loan contracted for the provision of a water supply by means only of the water rates and water rents charged to the consumers of water. The Court held that no such obligation was cast on the council. It was not necessary for the decision of the appeal before the Court to decide whether it was competent for the rural district council to include in these water rates provisions for the repayment, wholly or in part, of the capital borrowed, and the interest on that capital; in fact, to do what the district council has done in the present case. "As against this view," Mr. Justice Kennedy says, "reliance was placed on the language used by Mellish L.J. in delivering the judgment of the Court of Appeal in *Corporation of Worcester v. Droitwich Assessment Committee*" (2). The decision in that case was not upon the Public Health Act, 1875, or the Public Health (Water) Act, 1878. It was a decision upon somewhat different, though in many respects no doubt analogous, provisions of the Public Health Act, 1848. "Having regard to the provisions of the Act of 1875," Kennedy J. says:—"I do not think that the passage referred to can be relied on either as direct authority or even as an expression of judicial opinion against the view to which, upon the whole, I have come upon this branch of the case." I am also of opinion that we get no assistance from the judgment of Mellish L.J. in deciding the question which comes before us in the present case. Upon the construction of the Public Health Act, 1878, I am clearly of opinion that it was competent to the district council to apply the rate, struck under the 66th sect. of the Act, in part, towards the payment of capital charges, as a necessary part of the cost of supplying the water. The amount which ought to be so applied, having regard to the different interests of the payers of the

(1) [1898] 2 Q. B. 358.

(2) [1876] 2 Ex. D. 49.

special rates and of the payers of the poor rate throughout the contributory area, is a question as to the reasonableness of the rate with which we are not concerned.

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I have applied myself to the consideration of the only two questions which are open on the notice of appeal before us. I concur with my brother Gibson in holding that we are precluded from considering the other objections to the validity of the rate which were mentioned in the argument of the case.

SLIGO R.D.C.

Madden J.

KENNY J. concurred.

Solicitor for the appellants: *M. J. Howley.*

Solicitors for the respondents: *Fitzgerald & M. Cormick.*

C N. K

K. B. Div. ABINA COUGHLAN, PLAINTIFF, *v.* JOSEPH MONKS & CO.,
1917.
LTD., DEFENDANTS (1).

April 30.

Appeal.

Nov. 14, 15.

Dec. 17.

Negligence—Shipowner—Defective gear on ship—Duty of shipowner in relation to persons unloading ship—Misdirection.

The defendants, owners of a steamship, chartered their vessel for the carriage of coal to Cork. Under the charter-party the cargo, which was consigned to the Cork Gas Company, was to be discharged by the steamer giving the use of steam-winchcs, gear, and sufficient steam. The consignees of the cargo employed H., a stevedore, to discharge the cargo. This was done, by direction of H., by working both steam-winchcs of the vessel on the derrick attached to the foremast, one winch being used for hoisting, and the other for swinging the derrick. There was no arrangement on the ship for swinging the derrick when the ship was handed over to H., and the derrick could have been swung by employing two men with ropes. Shortly after the discharge of the cargo had commenced the forestay snapped, and the foremast fell, breaking close to the deck. As a result the derrick fell into the hold, and killed C., an employee of H.

In an action under Lord Campbell's Act by C.'s wife against the defendants it was proved that the stay and mast were rotten, and pieces of each were inspected by the jury. Evidence was given that the defective state of neither the stay nor the mast was visible before the accident, and that the ship, two years before the accident, had been passed as sound and perfect on Lloyd's survey. The judge at the trial directed for the defendants on the ground that they were only under a duty to use reasonable care to see that the appliances were in fit and sound condition, and that on the evidence no precaution was suggested or proved that would have discovered the defect owing to which the accident occurred.

Held, by the Court of Appeal (1), affirming the judgment of the King's Bench Division (2), granting a new trial, that the jury might form their own opinion on the state of the stay and mast from inspection, that there was sufficient evidence to go to the jury, and that the case should not have been withdrawn by the learned judge.

Where an accident results from defective condition of plant, the burden of disproving negligence lies on the person responsible for the defect.

Scott v. The London and St. Katherine Docks Co. (3 H. & C. 596), and *Flannery v. Waterford and Limerick Railway Co.* (1 R. 11 C. L. 30), followed; *Hanrahan v. Ardnamult Steamship Co.* (22 L. R. Ir. 55) doubted.

(1) Before SIR I. J. O'BRIEN C., and RONAN and MOLONY L.JJ.

(2) Before SIR JAMES CAMPBELL C.J., and GIBSON J.

NEW TRIAL MOTION.

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On behalf of the plaintiff for an order that the verdict and judgment entered for the defendant on the trial of the action should be set aside and a new trial of the action should be ordered.

The action was brought under Lord Campbell's Act (9 & 10 Vict. c. 93) by the plaintiff, Abina Coughlan, to recover damages for the death of her husband Daniel Coughlan, due to the negligence of the defendants, and was tried before Dodd J. and a special jury of the city of Cork at the Cork Summer Assizes, 1917. Verdict and judgment were entered for the defendants on the direction of Dodd J.

The following are the material portions of the judge's report on the trial :—

“Peter Halloran, stevedore—‘I entered into an agreement to discharge the cargo for the Cork Gas Company. At 10 o'clock on August 15th I commenced to discharge. The model (produced) is accurate, with one exception, the starboard deck-block is further forward than appears on the model; it should be opposite the hold. The ship discharged on the port side. The derrick broke in two parts.’ [To a juror.] ‘It was not the top part that fell into the hold, it was the remaining portion fell in; the bucket fell into the hold, but it was not the bucket, it was the derrick that killed the deceased. I heard a noise like a snap, the snapping of a stay-rop^e; it caused a noise by striking against the mast. The mast fell down, the derrick fell into the hold, and the labourer was killed.’ [To a juror.] ‘There is a rigging-screw for tightening the forestay from the deck.’ [Question by juror—‘Whose business is it to look after the rigging?’ Answer—‘I acted on the assumption that it was the duty of the ship to look after the tackle.’] ‘The same practice was adopted as usual. The steam-winch and gear was used as usual and customary in the port. I saw the mast after the accident, it was broken off about 1 foot or 18 inches from the deck.’ [Counsel reads from the Charter-party—‘Cargo to be discharged by charterers, steamer giving the use of steam-winches and sufficient steam, and allowing

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1s.] 'The stay was rotten. It appeared to me to be rotten. The mast broke. There was a cap on the mast, 1 foot or 9 inches. I saw the condition of the mast. It appeared to me to be rotten. The bucket which fell is about 14 cwt. in weight. There is a strain on this part of the mast.'

"Cross-examined:—'The document under which I was engaged as stevedore is at home. I agreed with the Gas Company I would insure my men. The ship is not equipped with a special crane or derrick. There was no arrangement on the ship for swinging the derrick when the ship was handed over to me; it is only hoisting that can be done by the steam-winch. The line from the winch was not rove. When I took over the ship I rove it through the top of the derrick and down to the port side; it went up to the mast-head block and direct to the winch. The peak iron was a single sheet (? sheaf) block. The line was led through the deck-block on the starboard side. I had two winches working on the same peak.' [Note by judge—'I got these answers down as accurately as I could, but counsel and witness were both pointing out on the model the parts referred to, and the jurors were also asking questions. I did not stay to get my note verified. Counsel on both sides were transparently fair to each other, and the Court may take the explanation given at the bar to amplify or modify my brief note. As I understood, the object of the cross-examination was to show that the witness was responsible for the proper fitting of the ship's appliances; that the two winches working at the same time, and the way the ropes were led to and from the winch to the mast and derrick, placed an undue strain on the appliances.' A juror asked—'Is it usual to have two winches on the same peak?' Another juror asked—'Wasn't there only one load?' The Serjeant explained there was a strain downward on the peak to starboard, and a pull on the forward winch down and to port at the same time.']

"Witness continues:—'The forestay looked all right to me. The mast looked all right from the outside. There was nothing on the ship to show I might not go on with the unloading; Moriarty was standing by the after-winch.'"

"[Note by judge:—'The jury and counsel again had some explanations. It was suggested that Moriarty's winch should not

have been worked; it was to save the trouble of two men with guy ropes to regulate the swing.']

"Denis Halloran, brother of Peter Halloran, examined:—'At 10.30 o'clock I heard something snapping. I shouted to the men in the hold to look out. I shut off the steam of the winch. I knew something would happen. The end of the mast jammed up the edge of the winch.'

"Michael Hayes, Sergeant R.I.C., examined:—'On the morning of the 25th August I examined the forestay; it was rotten. I produce part of the mast. I examined it where it broke at the band on the deck. The pieces of the mast are soft, pulpy, and rotten.' [Note by judge:—'The jury handed round and examined the pieces and made comments, one suggesting the mark was the paint on the outside and others making comments the other way. I did not examine the slices of the mast.'] Witness continues:—'The stay broke apart 18 inches from the bow. I cut off this portion of the stay I produce from the portion attached to the mast. The dark pieces of wood are from the mast; the black part was under the band.'

"Ernest Allhusen, factory inspector for the Cork district, examined:—'I visited the "Elsena" on the 25th August. I saw the mast; I examined it. There was some rot just above the cap, about 1 inch deep on the aft side. The mast was 49 inches in circumference. I examined the stay; it was quite rusted; some of the strands break in your fingers. Until the stay was broken you could not see the rot. Some strands of the stay were half rotten.' Not cross-examined.

"The plaintiff closed. Serjeant Sullivan asked for a direction on these grounds: That the ship was in the possession of the Cork Gas Company, or rather in the possession of an independent contractor, and that it was the duty of the stevedore to see that appliances were fit for the strain he was going to put upon them. That the injuries were the result of his breach of duty. The deceased was not a workman; the Gas Company had an independent contractor: *Elliott v. Hall* (1); *Marney v. Scott* (2).

"Without deciding on any of these propositions I said I was of opinion that there was no evidence of negligence, and I asked

(1) 15 Q. B. D. 315.

(2) [1899] 1 Q. B. 986.

K. B. Div. Mr. Lynch to formulate what the negligence was. He said as
 1917. follows :—‘ Having permitted this man to come on board to assist
 COUGHLAN in the discharge of the vessel when the gear that was being used
 v. for the purpose was in the condition in which it was proved to be,
 MONKS. and, secondly, for supplying gear to the deceased in the condition
 in which it was.’

“ I was of opinion that the question was based on the breach of too wide a duty on the shipowners ; it was consistent with there being no negligence ; there would be no negligence unless there was evidence that the shipowner knew or reasonably ought to have known that the gear was in such a condition. No precaution was suggested that the ship ought to have taken and did not take ; and both the stevedore and Mr. Allhusen said the defect could not be seen beforehand, and neither was asked as to any precaution which could have discovered it. The proposition assumed that the ship was insured as to fitness. I said I would leave the question to the jury, with a statement that they must find it was negligent to have the gear in such a condition, and get them to assess damages. I could find no such evidence, but if they could find it I would ask them to tell me what the negligence was. The Serjeant then tendered evidence on this issue to prove affirmatively that no reasonable precaution had been omitted.

“ He called W. G. Haigh, surveyor under Lloyd’s at Liverpool, who deposed :—‘ I examined the “Elsena” on her four years’ survey on the 4th August, 1915. She is a new ship, built by John Brown of Clydesdale. I carefully surveyed the ship. I had her in dry dock. I found her sound and perfect in every respect. There was nothing wrong with the mast on the survey ; she retained her class.’ Cross-examined :—‘ The stay was right when I surveyed it. The piece shown to me is defective.’

“ Captain Griffiths examined :—‘ I hold a master’s certificate. Until this accident I observed nothing wrong. I examined the ship. There was nothing outside to show any defect. We put a preventer on the after winch.’ Cross-examined :—‘ I attribute the injury to the undue strain put by two winches. If the stevedore had guided the derrick by two men with ropes the accident would not have occurred.’

“ I put the question as suggested by Mr. Lynch. The jury were

in a long time. I sent for them. The foreman said they were not agreeing. I then withdrew the questions and directed a verdict for the defendants. I said in giving judgment that in my opinion there was no contractual relation between the deceased and the defendants, and no duty arising from contract. The defendants knew that the appliances of the ship would be used by dock labourers. The duty cast upon them under such circumstances could only be a duty to take reasonable precautions to see that the appliances were fit. They were not insurers. On the evidence there was no precaution suggested or proved that would have discovered the defect owing to which on the plaintiff's case the injury occurred. On that ground I solely directed. The following questions were submitted to the jury, but were by my directions withdrawn from the said jury before they had answered same:— Were the defendants negligent in (a) permitting Coughlan to come on board to assist in the discharge of the vessel when the gear that was being used for the purpose was in the condition in which it was proved to be; or (b) in supplying gear to the deceased in the condition in which it was?"

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The plaintiff's motion for a new trial was grounded upon misdirection by the judge at the trial.

In accordance with the note of Dodd J., the Court accepted the statement of Mr. Lynch K.C., counsel for the plaintiff, that Captain Griffiths had been cross-examined as to the condition and care of the stay and mast.

P. Lynch K.C. (with him *Gerald FitzGibbon K.C.* and *George Daly*), for the plaintiff.

Sergeant Sullivan and *H. D. Conner K.C.* (with them *Hungerford*), for the defendants.

SIR JAMES CAMPBELL C.J. delivered the judgment of the Court as follows:—

In my opinion the trial of this case was not at all satisfactory. In the first place, it is quite evident that, owing to continuous reference to the model, the animated dialogue between the jury, counsel, and witnesses, and the comments of the jury, especially as regards the piece of wire, the attention of the learned judge was necessarily directed to what was happening before him, with the

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result that the note does not fully describe the evidence; consequently, we have not got before us details of a material portion of the evidence and the cross-examination. I accept the explanation made by Mr. Lynch at the bar, acting on the suggestion made by the learned judge, who has asked us to rely on the statements of counsel to supplement his note. I assume that Mr. Lynch did cross-examine the first witness for the defence with reference to the precautions he might take to preserve the stay and mast.

The accident was due to the conjunction of two causes—first, the breaking of the forestay; and, secondly, the smashing of the mast at its base. It has been argued that the evidence upon behalf of the defence, as reported in the notes of the learned judge, was intended to establish that the defect in the mast was not visible. I cannot myself so treat it, and it is certainly open to the opposite construction. I am inclined to take the view urged by Mr. FitzGibbon, namely, that the evidence was that the rot extended for an inch in depth where the mast entered the socket. That was apparently visible to the naked eye; and if so, there was evidence to go to the jury as to whether the defendants had taken ordinary care and caution to keep the gear safe and proper.

Again, on the second cause of the accident, the broken forestay, the question arises as to whether the jury was at liberty to act on their view of the part of the stay produced. Probably few of the jury were experts in rigging; some of them were probably acquainted with wire ropes, or at any rate familiar with the vitality of wire; some may have had practical experience of metals; and with the specimen of the stay produced before them, it is impossible to say that they were not entitled to draw upon their experience to assist them on the really material question, i.e., whether the defendants had failed, either through want of precaution or want of examination, to take such reasonable care of the mast and stay as it was their duty to take when the ship and gear were to be used by a person on their invitation.

If our judgment stands, the case must go to a new trial; it ought to be tried again. We are not at all satisfied with the way in which the case was presented on behalf of the plaintiff at the trial. The plaintiff was in poor circumstances, and probably not in a favourable position to employ expert witnesses; and her case

was presented in a very meagre way. We think that there was evidence to which the attention of the jury could or might legitimately have been directed in support of the cause of action. We shall therefore order a new trial, and direct that the costs of this motion, as well as those of the trial, shall abide the event.

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The defendants appealed (1).

Serjeant Sullivan and Conner K.C. (with them *Hungerford*), for Nov. 14, 15.
the appellants:— Dec. 17.

During the operation of unloading the ship was in the possession of the Cork Gas Company, the consignees of the cargo, and it was the duty of the stevedore employed by them to see that the appliances were capable of bearing the strain which was to be put upon them. In any event there was no evidence of negligence on the part of the defendants. The plaintiff did not discharge the onus which lay upon her of showing something which the defendants might have done, and which they omitted to do: *Smith v. Great Eastern Railway Company* (2). It was not enough to show that the accident might have occurred through the negligence of the defendants. This case is indistinguishable from *Hanrahan v. Ardnamult Steamship Company* (3). [They also relied on *Daniel v. Metropolitan Railway Company* (4).]

Lynch K.C., FitzGibbon K.C. (with them *G. J. Daly*), for the respondent:—

There was evidence from which the jury were entitled to infer negligence: 1, in the condition of the portions of the stay and mast which were produced to them at the trial; the liability of steel and iron to deterioration if exposed to the weather and unprotected by paint, tar, or other protectives is a matter of common knowledge, and the jury were entitled to say whether or not the stay produced to them had been properly treated or had been left improperly exposed for too long a period; 2, from the nature of the accident itself, which was an accident "such as

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN Bart., C., and
RONAN and MOLONY L.JJ.

(2) L. R. 2 C. P. 4, at p. 10.

(3) 22 L. R. 1r. 55.

(4) L. R. 3 C. P. 216.

Appeal. in the ordinary course of things does not happen if those who
 1917. have the management use proper care." This "affords reason-
 OUGHLAN able evidence, in the absence of explanation, by the defendants,
 v. that the accident arose from want of care": *Scott v. London Docks*
 MONKS. *Company* (1).

The onus of proof was shifted by the evidence given on behalf of the plaintiff, "and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts; that they have not done": per Coleridge C.J. in *Kearney v. London, Brighton, and South Coast Railway Company* (2).

The doctrine of *res ipsa loquitur* applies here; and the cases above cited, together with the decisions in *Christie v. Griggs* (3), *Carpue v. London and Brighton Railway Company* (4), *Byrne v. Boadle* (5), and *Briggs v. Oliver* (6), show that the case should not have been withdrawn from the jury.

Hanrahan v. Ardnamult Steamship Company (7) is distinguishable. No question of the application of the doctrine of *res ipsa loquitur* was argued on either side. If *Hanrahan's Case* (7) is indistinguishable from the present one, it is not law, and should be overruled. *Scott v. London Dock Company* (8) and *Kearney v. London, Brighton, and South Coast Railway Company* (9) are decisions of the Exchequer Chamber, well known, referred to as good law in all text-books on Evidence, Torts, or Negligence.

The law is correctly stated in sect. 69 of Sir Frederick Pollock's Draft Indian Civil Wrongs Bill (10), and, as so stated, shows that the plaintiff was entitled to have her case left to the jury.

Serjeant Sullivan, in reply:—

The doctrine of *res ipsa loquitur* does not apply, the cause of the incident being known and proved. *Hanrahan's Case* (7) was considered and approved of in *Burrell v. Tuohy* (11). In *Kearney's Case* (9) the loose brick could easily have been seen.

Cur. adv. vult.

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| (1) 3 H. & C., at p. 601. | (7) 22 L. R. Ir. 55. |
| (2) L. R. 5 Q. B., at p. 415. Aff. | (8) 3 H. & C. 596. |
| in Cam. Scacc. L. R. 6 Q. B. 759. | (9) L. R. 6 Q. B. 759. |
| (3) 2 Camp. 79. | (10) Pollock on Torts, 7th ed., at |
| (4) 5 Q. B. 747. | p. 634. |
| (5) 2 H. & C. 722. | (11) [1898] 2 I. R. 271. |
| (6) 4 H. & C. 403. | |

SIR IGNATIUS J. O'BRIEN C.:—

In common with my colleagues I have devoted a good deal of time and consideration to this case, and I should not have deemed it necessary to state my views at any length but for the fact that the principles underlying the decision of the King's Bench Division were strongly and ingeniously assailed in the argument before us.

The action is brought by the widow of Daniel Coughlan, a dock labourer, who was killed on August 25th, 1916, in an accident which occurred on board a vessel called the "Elsena." The owners of this boat had demised it by charter to the Cork Gas Company. She was built for the purpose of carrying coal, and technically she was properly described as a ship and registered as such.

In truth, however, she was really only a large floating coal receptacle, with machinery to propel her, and fitted with apparatus for loading and unloading. The charter-party on which the vessel was demised, and on which Mr. Lynch, who was leading counsel for the plaintiff at the trial, most properly laid stress, because it is the foundation of the action, provided that the cargo was to be discharged by the consignees, the owners of the steamer giving the use of steam-winchcs, gear, and sufficient steam, and receiving in return a substantial reward.

The plaintiff was not employed either by the owners of the vessel or by the charterers. He was employed by the stevedore whose services were retained by the charterers for the purpose of unloading the vessel. It is not necessary to go into details as to the structure of the hoisting apparatus which was part of this floating concern. In the main it consisted of an upright post which looked like a mast—and it is so described—sunk in a metal socket, and strengthened for the strain which was necessarily put upon it during loading or unloading, by means of a wire rope passing from the mast to the fore part of the "Elsena." To the casual observer, to the stevedore, and to the man who lost his life, the whole apparatus appeared to be absolutely in good order, sound and efficient for its purpose. Unfortunately, however, it could not have been in that condition, nor is there anything in the evidence to suggest that it was in good order and fit for its

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purpose; nothing to suggest that when it snapped the snapping was not due to inefficiency and insufficiency for bearing the actual strain put upon it at the time of the accident; and for the purposes of the present application I must assume that the strain was normal and not extraordinary. It is necessary that I should be distinct on this point, lest there should be any misapprehension as to my judgment.

In these circumstances the plaintiff was able to show that the collapse of the apparatus must have been due to insufficiency; in the second place he was able to show, so far as the vertical mast was concerned, that it was to a certain extent in an unsafe condition, owing to the rottenness which extended from the external surface to a depth of about 1 inch at the point where the mast was set in the metal socket. A great deal of the difficulty and confusion in this case arises from the fact that at one stage an effort was made by one of the parties to attribute the accident to the specific defect in the mast, while on the other side it was suggested that that specific defect could not have been the cause of the accident, because as a matter of mechanics what actually broke first must have been, not the mast, but the steel rope, as to which the only evidence we have is the production of about 2 feet of the actual article which was found on the "Elsena" after the accident.

In approaching the question involved in this case it is not uninteresting to glance at the law in some other countries in regard to proof in accidents of this kind. It is most interestingly dealt with in *MacArthur v. Dominion Cartridge Company* (1). It appears according to the law of France, which law was supposed to apply to French Canada, that where the accident is one in which the whole occurrence takes place so suddenly that one cannot, so to speak, put his finger on the exact cause, the plaintiff must fail because it is assumed—and this view has found expression, though not always quite happily, in some of our own cases—that the accident being equally attributable to negligence or no negligence the plaintiff has not sustained his proof. What actually happened in that case enabled the House of Lords to come to the conclusion that the cause of the catastrophe was in all human

(1) [1905] A. C. 72.

probability a defect in that portion of the machinery in which cartridges were placed for the capping process. The French court in Quebec were clearly of opinion that as to the cause of the explosion they were left in the dark, and it is to the observations of Lord MacNaghten on that aspect of the case I desire to direct attention. At page 77 he says:—"The learned judges in the Supreme Court appear to have been much influenced by some decisions in France which are stated by Girouard J. to be 'unanimous in exacting proof of a fault which certainly caused the injury.' The learned judge had previously observed that 'as to the cause of this explosion . . . we are left entirely in the dark.' As recent French decisions, though entitled to the highest respect, and valuable as illustrations, are not of binding authority in Quebec, the learned counsel at the bar very properly abstained from examining in detail the cases referred to by Girouard J. It is enough to say that although the proposition for which they were cited may be reasonable in the circumstances of a particular case, it can hardly be applicable when the accident causing the injury is the work of a moment, and the eye is incapable of detecting its origin or following its course. It cannot be of universal application, or utter destruction would carry with it complete immunity for the employer." The doctrine of our law as I conceive is based upon a more commonsense principle; and according to that principle the onus is, in certain cases, *prima facie* cast upon the defendant of showing that he had efficiently discharged his obligation towards the plaintiff.

Where the accident is of an abnormal character and no blame can be imputed to the plaintiff himself, the facts reasonably suggest that there may have been some negligence on the part of the defendant. At one period in the history of this doctrine attempts were made to classify the cases in which the onus of proof was shifted, and to define another category as to which the application of the doctrine was excluded. Willes J., in his judgment in *Smith v. Great Eastern Railway Company* (1), referred to in *Kearney v. The London, Brighton, & South Coast Railway Company* (2), suggests one of the earliest attempts at classification, and adopts from the judgment of Erle C.J. in *Hammack v. White* (3) the following

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(1) L. R. 2 C. P. 4. (2) L. R. 6 Q. B. 759. (3) 11 C. B. (N. S.) 588.

Appeal. passage:—"I do not assent to the doctrine that mere proof of
 1917. accident throws upon the defendants the burden of showing the
 COUGHLAN real cause of the injury. All the cases where the happening of an
 v. accident has been held to be prima facie evidence of negligence
 MONKS. have been cases of contract." The second attempted classification,
 Sir Ignatius J. based, I rather think, on the decision in *Heaven v. Pender* (1) and
 O'Brien C. the decisions following it, endeavoured to bring within one category
 cases where there was "invitation." The word is not a very
 satisfactory one, because as a matter of fact there is no real invita-
 tion. In the light of more recent authorities these classifications
 appear to me to be too artificial. I think the true principle
 is to be found in the passage which I have quoted from Lord
 MacNaghten's judgment in *MacArthur's Case* (2). There may be
 particular cases in which it may be necessary for the plaintiff to
 give evidence of the exact cause of the accident; but where there
 is an obligation on the defendant to use reasonable and proper
 care, and the accident is not such as would normally occur if the
 apparatus was reasonably fit for its purpose and under proper
 control, the burden of proof is on the defendant to show that he
 was not guilty of negligence.

In the course of the argument I referred more than once to a
 case, the facts of which I was able to recall, although I could not
 cite the name and reference. Counsel were not able at the
 moment to find the case, but at the conclusion of the argument
 Mr. Lynch handed it to us. The case is *Flannery v. The Water-
 ford and Limerick Railway Company* (3). That was a case where
 portion of the train in which the plaintiff was travelling suddenly
 left the rails; and the question argued was whether or not that
 fact, taken by itself, did not, having regard to the obligation of
 the defendants to use due and proper care in providing safe con-
 veyance for passengers, afford some, although possibly slight,
 evidence of negligence on their part. That was undoubtedly a case
 in which there was a contract between the railway company and
 the plaintiff, but no distinction was drawn by Pallett C.B. on that
 ground. To my mind, the case contains one of the clearest and
 most admirable expositions of this branch of law to be found in
 any of the authorities. The Chief Baron does not concern himself

(1) 11 Q. B. D. 503. (2) [1905] A. C., at p. 77. (3) I. R. 11 C. L. 30.

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with any of the distinctions suggested by earlier authorities as to whether the case was one connected with contract or the artificial doctrine of invitation. The case was argued by Mr. O'Brien, afterwards a member of the Bench, and Mr. O'Brien, afterwards Chief Justice; and with that terseness of expression which characterized the former, he began his argument in this way:—"A train is made to run on the rail, not off it. In consequence of the train leaving the rails an injury happened to the plaintiff, yet the company not only gave no solution whatever of the cause of the occurrence, but they gave no evidence to show it was insoluble." The Chief Baron, at pp. 35-6, says:—"The case, then, is one in which negligence of any one of three classes would, if sufficiently connected with the injuries, be sufficient to maintain the action—firstly, negligence in the supervision and maintenance of the permanent way at the point where the waggon left the line; secondly, negligence in the supervision or maintenance of the waggon itself; thirdly, negligence in the driving of the engine. Negligence in any one of these three particulars would be an obvious explanation of the waggon leaving the line. On the other hand, the circumstance of the waggon leaving the line is not inconsistent with inevitable accident, nor with the malicious act of a third party; but it will not, I apprehend, be contended that the latter assumption, involving, as it does, a criminal offence, ought to be made in the absence of any evidence pointing in that direction." If the present case had gone to the jury, as I conceive it should have, and they had found that the death was due to inevitable accident for which the defendants were not liable, I should be content; their verdict might be quite right, but, in my opinion, the case cannot be taken from them. Palles C.B. goes on:—"The defendants argue from this circumstance alone (that the alternative of inevitable accident was not only a possible but a reasonable one) that the case ought not to have been left to the jury; that the existence of any reasonable alternative in which the defendants will not be liable is a fatal objection to the plaintiff's case. If they are right in this, any case in which the facts are not in dispute, but are capable of supporting either of two separate inferences of fact, one of which will support and the other defeat the plaintiff's case, ought to be

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withdrawn from the jury. Now, I say with deference that this is not, and never was, the law. Such, no doubt, is the law if each of such alternative inferences is, as it is styled, equally inconsistent with the facts proved. This, in my opinion, is not a very happy expression. In applying the rule it must be borne in mind that before it can lead to a direction against a plaintiff the Court must assume that every inferences of fact which a jury might legitimately draw in favour of the plaintiff has been drawn, and must assume the existence of the fact so inferred, in addition to the facts proved. It follows that the rule has no application to cases in which a reasonable inference in favour of the plaintiff might be drawn. If it might, it must for the purposes of direction be assumed to have been drawn. To say that each of two inferences—the one sufficient and the other insufficient to support the case—is equally consistent with the facts proved, is but another mode of saying that the inference in support of the plaintiff's case cannot reasonably be drawn. In that event the plaintiff, who requires preponderating evidence, must fail. It is a wholly different proposition that the same result must follow where, although a reasonable inference against the plaintiff might be drawn, yet an inference the other way would also be reasonable. In such an event the case is for the jury, and (although some of the propositions in decided cases upon this subject are not as clearly expressed as might be desired) I have a strong opinion that to impute to any judge an intention to lay down the opposite doctrine is to misconstrue his language. If I am right in this, the sole question in the case is: whether the jury might have legitimately drawn from the facts proved the inference that the waggon left the rails in consequence of defect in the wheel, defect in the rail, or mismanagement of the engine. No doubt, in determining whether this inference of fact might reasonably be drawn, we, although not jurors, must avail ourselves of our knowledge of the ordinary affairs and incidents of life. Without this knowledge we cannot determine, as we are bound to do, whether a particular inference can reasonably be drawn. Now, applying my own experience of railway travelling, I find it impossible to say that it is in the ordinary and accustomed course of things that a waggon should leave the rails when all reasonable precautions are taken."

Where we have got a huge floating coal receptacle, with machinery for unloading that coal, it is not only commonsense but law that all reasonable precautions must be taken by the persons who supply the apparatus for that express purpose to ensure that the apparatus for loading and unloading is sufficient for the purpose; and if a mishap occurs, one is not to assume, I conceive, that it is attributable to inevitable accident. The plaintiff in the present case has a stronger case than the plaintiff in *Flannery v. The Waterford and Limerick Railway Company* (1), inasmuch as here she has shown by reason of the defective state of the mast that the apparatus, as a whole, might not have been properly supervised, while; by the production of the piece of broken stay, she has at any rate given some evidence that there might have been a similar want of care with regard to the preservation and upkeep of the stay.

The argument based on *Hanrahan v. Ardnamult Steamship Company* (2) does not commend itself to my good sense. It was to the effect that the plaintiff had to start by proving affirmatively every possible act of negligence which might arise from omission of duty on the part of the defendants, and that it was not for the latter to show if, and at what time, the apparatus had been painted, or anything of that kind. Not only did the plaintiff in the present case show that apparatus that ought to have been sufficient for its purpose suddenly collapsed, but she also produced evidence, which a jury ought to consider, as to the condition of part of that apparatus, showing it may have been defective, and I think it is for the jury to consider whether the sudden failure of the apparatus is more consistent, rationally and reasonably, with the absence of the due and proper care imposed upon the defendants than with inevitable accident.

Continuing his judgment in *Flannery v. The Waterford and Limerick Railway Company* (1) the Chief Baron says:—"I now gladly turn to one case, distinguished from the chaos of authorities depending on particular facts, by an attempt at the application of something in the nature of principle to cases of this class." He referred to *Scott v. The London, &c., Docks Company* (3), and

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(1) 1. R. 11 C. L. 30.

(2) 22 L. R. Ir. 55.

(3) 3 H. & C. 596.

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quoted from the judgment of Erle C.J. the following passage:—
“There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.” The Chief Baron added that he entirely subscribed to the doctrine laid down in *Scott v. The London, &c., Docks Company* (1), as applied to cases like that and the one before him, “in which the facts lie more in the knowledge of the defendants than of the party injured.” In this connexion I have referred to the unreasonableness of compelling the plaintiff to give evidence as to facts which must have been better known to the defendants. It is for them to show that they did everything that reasonable men ought to have done; not for the plaintiff to demonstrate scientifically what particular defect in the apparatus caused the accident. The defendants were about to make a profit out of machinery which they knew would have to be operated by persons not their servants, and which, to be worked with safety, should be in a fit condition for discharging its functions. This, as I understand, is the meaning of that part of the Chief Justice’s judgment in which he refers to the use of the ship and gear at their invitation. Here the defendants knew that the machinery for loading and unloading was to be used by persons not in their employment, strangers lawfully using the ship and gear; and when an accident happens in such circumstances, it seems to me that the case comes clearly within *Scott v. The London, &c., Docks Company* (1), adopted in *Flannery v. The Waterford and Limerick Railway Company* (2), which I consider was rightly decided.

I have laid stress upon the words “persons not in the defendants’ employment,” lest possibly this circumstance might afford some ground for upholding the decision in *Hanrahan v. Ardnamult Steamship Company* (3). In that case the man who was killed was a servant of the defendants; and I find that Smith on Master and Servant was cited by counsel for the defendants, which suggests that this would affect the case. It is a remarkable fact that while *Flannery’s*

(1) 3 H. & C. 596. (2) I. R. 11 C. L. 30. (3) 22 L. R. Ir. 55.

Case (1), was relied upon by counsel for the plaintiff, the Chief Baron in his judgment makes no reference whatever to the very clear language he himself used in that case. Perhaps this gives the key to the distinction; and the *Ardnamult Case* (2) being a case of master and servant, it may be the Chief Baron thought that on that account it rested upon a different basis from *Flannery's Case* (1); but I am not able to reconcile some of the language used by the Chief Baron in the *Ardnamult Case* (2) with his own language in *Flannery's Case* (1), which I consider to be one of the best statements of the law to be found.

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I feel bound to follow the former decision of the Chief Baron, harmonizing, as it does, with my own view of the law, and with the judgment of the Court of Appeal in England in *Kearney v. The London, Brighton, and South Coast Railway* (3). The judgments of the* Exchequer Chamber were very little more than an affirmance of the judgments delivered in the Court below by Cockburn C.J., and Lush J.; Hannen J. dissenting. The dissenting judgment of Hannen J. is practically the defendant's case here. He says:—"In this case the evidence consists of the bare fact that the accident happened from some utterly unknown cause. I think it did not lie on the defendants to offer any evidence in such a state of things. If any conjecture may be offered as to whether or not the defendants, by proper inspection, would have been able to guard against the occurrence of that accident, it seems to me that it lies on the plaintiff to show that the facts were such that by an inspection anybody might have seen that the brick was about to fall down. The plaintiff did not give any such evidence, and I cannot but think that if it had been possible, remembering that such evidence would have depended only on theory—a class of evidence which it is not at all difficult to get—there would have been no difficulty in obtaining such evidence, if anybody could have put forward a plausible theory." But Hannen J.'s judgment was overruled both in the Court below and in the Exchequer Chamber on appeal, and so there is an end of the argument. We are thrown back upon the judgment of Cockburn C.J., which makes the matter perfectly clear. He

(1) I. R. 11 C. L. 30.

(2) 22 L. R. Ir. 53.

(3) L. R. 5 Q. B. 411; L. R. 6 Q. B. 759.

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 Sir Ignatius J. O'Brien C. says:—"Where it is the duty of persons to do their best to keep premises or a structure of whatever kind it may be in proper condition, and we find it out of condition and an accident happens therefrom, it is incumbent on them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident has arisen." There was an obligation upon the defendants in the present case to have a proper apparatus, and to use reasonable care and diligence in keeping it in position; and, according to the general principle laid down in *Kearney's Case* (1), the onus was put upon them of showing that they did use such care and diligence. "On the other hand (says Cockburn C.J.), I admit most readily that a very little evidence would have sufficed to rebut the presumption which arises from the manifestly defective state of this brickwork. It might have been shown that many causes, over which the defendants had no control, might cause this defect in so short a time as that it could not be reasonably expected that they should have inspected it in the interval." True, the defendants here did not rely solely on their application for a direction at the conclusion of the plaintiff's case; they gave evidence, but the jury were unable to agree, and the case was withdrawn from them. In withdrawing it from the jury the judge was not, in my opinion, right; and the case must go to a new trial.

One passage of the judgment of the Lord Chief Justice was somewhat animadverted upon during the course of the argument. He said: "Probably few of the jury were experts in rigging; some of them were probably acquainted with wire ropes, or at any rate familiar with the vitality of wire; some may have had practical experience of metals; and with the specimen of the stay produced before them, it is impossible to say that they were not entitled to draw upon their experience to assist them on the really material question." It has been said that the jury must rest content with the scientific evidence given, if the case is one in which such evidence must give the solution. That is quite right in a sense, because no jurymen has a right to convert himself into a witness for the plaintiff

(1) L. R. 5 Q. B. 411; L. R. 6 Q. B. 759.

for the defendant; but I agree with the Chief Justice that where an occurrence is being investigated not from a scientific, but from a commonsense, point of view it should be a matter for satisfaction that the jury as men of the world display some knowledge of the apparatus in question. The sum of knowledge possessed by jurors fifty years ago was much smaller than at present. Boys at school are now better instructed on many scientific matters than the quasi-scientific experts of half a century ago; and unless a juror should be excluded on the ground that he is an educated man, or, as the Lord Chief Justice says, familiar with certain aspects of the problem under consideration, I do not see any force in the point made in the argument to the effect that the Chief Justice had suggested that the jurymen should convert themselves into witnesses. No one would be less likely than the Chief Justice, with his practical commonsense and keen and profound knowledge of law, to lay down the proposition attributed to him. He starts by saying that the trial of the case was not at all satisfactory, not by reason of the conduct of counsel, but apparently owing to the poverty of the plaintiff, who was unable to produce scientific witnesses; and as there were no such witnesses, he thought it well that the jury should apply their own knowledge. In that he was quite right, and his short judgment expresses succinctly the views which I entertain.

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RONAN L.J.:—

When the derrick in this case was in position for use, it, the mast, the supports of the mast, i.e., the rigging, and the vessel herself, all formed one apparatus for the discharge of cargo. All this apparatus I shall call the "plant." It was all the property and in the occupation of the defendants, and they were bound under the charter-party to permit the consignees to use it for the discharge of the cargo. The discharge of the cargo was carried out by a stevedore employed by the consignees.

The deceased, a poor labourer, was employed by the stevedore in the work of discharge. The stevedore proceeded to carry out the discharge with the plant supplied to him by the defendants for that purpose. There was no unusual weight lifted. The ordinary bucket was used; but it carried three-quarters of a

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ton of coal. The discharge necessarily imposed a very heavy back-strain on the mast. The main resistance to this strain was supplied by the forestay. The mast itself and shrouds, no doubt to a limited extent, gave some resistance to this back-strain; but the shrouds were really only intended and effective to prevent lateral strain. This plant, without an adequate forestay, would have been highly dangerous if used as intended. If there was no forestay, or if the forestay was obviously defective, no man in his senses, who had any experience of the work, would have ventured to discharge this cargo with the plant.

What was the condition of the forestay in this case? The evidence is clear. Mr. Allhusen, factory inspector, said: "I examined the stay. It was quite rusted; some strands break in your fingers. Until the stay was broken you could not see it. Some strands on stay were half rotten." He was not cross-examined. A piece of the broken stay was produced, and quite bore out his evidence. In my opinion this evidence proves that the plant in this case was neither more nor less than a death-trap, with the danger effectually concealed. The deceased went to work with this plant. The stay broke, and the deceased was killed in consequence. This is the most favourable view of the case for the defendants, as it omits all question of negligence in relation to the mast itself. Mr. FitzGibbon, in his brilliant argument, accepted this view, and argued the case on it. It is, in my opinion, the true view of the case, as the breaking of the stay was the real cause of the accident. The defendants were not absolutely bound to provide and maintain a proper stay; they were only bound to use due and reasonable skill and care to do so; but, as the result of failure to provide and maintain such a stay meant, in such a case as this, probable death of, or injury to, persons employed, it is obvious that the greatest skill and care should be taken in the matter.

The breaking of a stay and consequential death of, or injury to, a man is not a normal occurrence; but such things do occur, and it is essentially a danger to be provided against. It seems to me that the question in this case is whether there was not evidence from which the jury might reasonably have found that, if due and proper care had been taken, the stay would not have been allowed to reach or remain in the rotten condition in which it

was. The case for the defendants must be: "True, the stay was rotten. We know where we got it, and how we have dealt with it. We know everything about it; you know nothing. Still we decline to justify, explain, or excuse our conduct in supplying this death-trap. It is for you (who know nothing about it) to specify and prove in what respect we failed to use due care in relation to the stay." Serjeant Sullivan strongly relied on the proposition laid down by Willes J. in *Smith v. Great Eastern Railway Company* (1), so often quoted in text-books: "It is not enough to show that the damage may have occurred through the negligence of the defendants' servants . . . The plaintiff must show something which the defendants might have done, and which they omitted to do, before they can be held responsible." He also strongly relied on *Hanrahan's Case* (2) as being indistinguishable from the present. I shall deal with these cases later on, but I may say that *Hanrahan's Case* (2) is my excuse for this long judgment.

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The discharge of cargoes by means of such plant as this is a matter of daily occurrence in every port in the world. This would not be so if, by the exercise of reasonable care, such plant could not be made and kept safe. Accidents will happen. The plant will be found in a dangerous condition in some cases. But these cases are the exception, not the rule. They may arise from the want of care on the part of those responsible for the plant, or of those using it, or, perhaps, in some cases be inevitable accidents, that is, such as could not be avoided by the exercise of reasonable skill and care.

There are two principles applicable to this case: 1, the principle of *res ipsa loquitur*; and 2, the principle that where facts "lie more in the knowledge of the defendant than of the party injured": *Flannery v. Waterford and Limerick Railway Company* (3); it lies on the defendant to prove them. A full discussion of the authorities on this subject will be found in Chapter IV of Beven on Negligence, dealing with onus of proof. The particulars of most of the cases I refer to will be found in this chapter. At one time it was suggested that the duty as to providing proper plant

(1) L. R. 2 C. P. 4, at p. 10.

(2) 22 L. R. Ir. 55.

(3) L. R. 11 C. L., at p. 39.

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is stronger in the cases of contract. The modern authorities, I think, leave no doubt as to the extent of the duty where a person provides a structure or apparatus to be used by others.

In *Manzoni v. Douglas* (1), Denman J. points out the broad distinction between the cases where the accident arises from the condition or management of an inanimate thing and those in which it arises from the management of an animal such as a horse. Mr. Beven and modern writers have adopted this distinction. It is obvious that in the latter class of cases the element of the horse becoming unmanageable, as a rule, makes it impossible to hold that an accident is *prima facie* evidence of negligence. Such cases and the dicta concerning them have really no application to cases like the present, which deal with inanimate objects. Accidents arising from these must arise from their condition or from the mode of user. They must arise either from human negligence, from wilful misconduct, or from inevitable accident. I shall chiefly refer to cases of this class, and shall not deal with cases like *Hammack v. White* (2) (a horse case), or the statements of the law applicable to such cases. I may mention, however, that in very special circumstances where the accident arose from a horse kicking the omnibus he was drawing the accident was held *prima facie* evidence of negligence: *Simson v. General Omnibus Company* (3). And on the other hand, in the case of the skidding of a motor-bus, it was not held to be such evidence: *Wing v. London General Omnibus Company* (4); but these cases are exceptions.

I shall now refer to a few of the principal cases. The earliest I have found is *Christie v. Griggs* (5). It illustrates the two principles I have stated. Though only Nisi Prius reports, Campbell's reports are of high authority; but my chief reason for citing it is that it is quoted by the Lord Chief Baron in *Flannery's Case* (6) as a correct statement of the law. I take the statement of the case from his judgment. He says:—"That was an action for personal injuries sustained by a passenger being thrown from the top of a coach. The plaintiff proved that the axle-tree snapped

(1) 6 Q. B. D. 145.

(2) 11 C. B. (N. S.) 588.

(3) L. R. 8 C. P. 390.

(4) [1909] 2 K. B. 652.

(5) 2 Camp. 79.

(6) 1. R. 11 C. L., at p. 38.

asunder at a part of the road where there was a slight descent. He gave no evidence of the cause of the snapping." Proceeding, he cites the following passage from the judgment of Sir James Mansfield, upon an application to non-suit:—"I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found But when the breaking-down or over-turning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a mere accident." Finally, in the year 1912, in *Lilly v. Tilling* (1), the case of *Christie v. Griggs* (2) is cited and adopted by the English Court of Appeal as the authority for their judgment. The dictum of Farwell L.J., that "the rule in contract is different from that in tort," seems only based on dicta in *Hammack v. White* (3). I shall cite several cases which prove that the doctrine is not confined to cases of contract: among others, *Scott v. The London, &c., Docks Company* (4); *Byrne v. Boadle* (5); and *Kearney v. London, Brighton, and South Coast Railway* (6).

In *Carpué v. London and Brighton Railway Company* (7) the plaintiff was injured by the train in which he was a passenger going off the rails. At the trial, in 1842, Lord Denman gave the following direction to the jury:—"They must be satisfied that the accident had been brought about by the negligence of the defendants in the course of carrying the plaintiff upon the railway; and that it having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not be reasonably expected to give."

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(1) 57 S. J. & W. R. 59.

(2) 2 Camp. 79.

(3) 11 C. B. (N. S.) 588.

(4) 3 H. & C. 596.

(5) 2 H. & C. 722.

(6) L. R. 5 Q. B. 411; L. R.
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(7) 5 Q. B. 747.

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A rule nisi was granted for a non-suit (a) on the ground of no notice of action, or (b) for a new trial on the ground of misdirection in telling the jury that it lay on the defendant to disprove negligence rather than on the plaintiff to prove it. On the second day of the argument Thesiger, for the defendant, said they only wished for the opinion of the Court on (a). This, of course, meant that he abandoned (b) and acquiesced in the direction. This is, in my opinion, a most important case, having regard to its date and to the fact that the mere circumstance that the railway and the train were under the exclusive control of the defendants, and that the accident had occurred, cast upon them the burden of disproving negligence. It will be observed that there is nothing in the direction suggesting that there was evidence as to what caused the accident, or any reference to any cause. The case illustrates both principles.

In 1850 this case was referred to in *Skinner v. London, Brighton, and South Coast Railway Company* (1). That was a case of a collision between trains of the defendant company. Pollock C.B. at the trial directed as in *Carpue's Case* (2). Bramwell moved for a new trial on the ground that "the effect of the direction was to cast the onus probandi on the wrong party. The plaintiff complains of negligence, and therefore he is bound to prove it; and for that purpose it is not enough to show that an accident, in fact, happened, but he ought further to prove that the accident was the result of the defendants' negligence." Pollock C.B.: "Surely the fact of a collision between two trains belonging to the same company is, prima facie, some evidence of negligence on their part." Alderson B.: "It is not necessary for the plaintiff to trace specifically in what the negligence consists, and if the accident arose from some inevitable fatality, it is for the defendant to show it." This seems to me in accordance with the law as stated in *Christie v. Griggs* (3) and *Carpue's Case* (2). Referring to *Carpue's Case* (2), Pallett C.B. says (4):—"Lord Chelmsford in *Great Western of Canada Company v. Braid* (5) says that case is well decided."

(1) 5 Ex. 787.

(2) 5 Q. B. 747.

(3) 2 Camp. 79.

(4) I. R. 11 C. L., at p. 32.

(5) 1 Moo. P. C. (N.S.), at p. 116.

In 1858 in *Bird v. Great Northern Railway Company* (1), *Carpue's Case* (2) and *Skinner's Case* (3) were referred to. It was a case of a train going off the line at a spot where the then new process of "fishing" the rails had not been applied. There were some dicta during the arguments as to the burthen of proof not consistent with the last two cases. The defendants gave evidence to disprove negligence. The judgment was: "It is impossible to say that the accident itself was, even if prima facie proof of negligence, conclusive proof of it. And if not, then, as there was evidence on both sides, the question was for the jury." The ruling of Lord Dehman in *Carpue's Case* (2) was questioned and disapproved of by Martin B. in *Scott v. London and St Katherine Docks Company* (4), where he says: "No one acts on that case." But he bases his judgment on the animal case of *Hammack v. White* (5). The facts in *Scott's Case* (4) were these: The plaintiff, a Customs officer, passing through the docks on lawful business, was injured by goods falling from an overhead crane. On proof of these facts only Martin B. directed a verdict for defendants. Upon an application for a new trial Martin B. upheld his direction. Channel and Pigott BB. held plaintiff entitled to a new trial on the ground that the defendants were called on to explain how the accident happened. Pollock C.B. intimated that he was inclined to agree with Martin B., but in order to facilitate an appeal he took no part in the judgment. The case went to the Exchequer Chamber (6). I take the statement of the effect of the case from the judgment of Palles C.B. in the case I shall now refer to, and which in my opinion rules the present case. In *Flannery v. Waterford and Limerick Railway Company* (7) the plaintiff was injured through some empty waggons in the train in which she was travelling going off the line. No evidence was given as to the cause. Palles C.B. gave judgment, in which FitzGerald and Dowse BB. concurred. Mr. Beven, in his work on Negligence, 3rd ed., p. 126, says that "it well deserves study," and quotes the greater part of it. Palles C.B. quoted with approval the following passage from the judgment of the Court in *Scott's Case* (4):—"There

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(1) 28 L. J. (N. S.) Ex. 3.

(2) 5 Q. B. 747.

(3) 5 Ex. 787.

(4) 34 L. J. Ex. 17, at p. 18.

(5) 11 C. B. (N. S.) 588.

(6) 3 H. & C. 596.

(7) I. R. 11 C. L. 30.

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must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The Chief Baron added: "I entirely subscribe to the doctrine laid down in *Scott v. The London, &c., Docks Company* (1) as applied to cases like that and the present, in which the facts lie more in the knowledge of the defendants than of the party injured. Applying it to the facts before us, I am of opinion that as the railway, the engine, and the waggons were under the defendants' management, and as the circumstance of the waggon leaving the rails does not happen in the ordinary course of things if due care is used, the fact of the accident was sufficient evidence to call upon the defendants to show that there was no negligence on their part; and as they declined to afford any explanation of the cause of this unusual occurrence, the case was rightly left to the jury." It will be observed that so far as authority is concerned he rests his judgments on the principle laid down in *Scott's Case* (2). This judgment has, in addition to the great authority of the Lord Chief Baron himself, the assent of FitzGerald B., of whom he always speaks with such profound respect and admiration, and also of Dowse B. It is remarkable that the case of *Kearney v. London, Brighton, and South Coast Railway Company* (3), on which Mr. Fitzgibbon mainly rested his brilliant argument, was not cited, and the Irish judges arrived at the same principle independently of that case. *Scott's Case* (2) and *Flunnery's Case* (4), as far as I know, have never been questioned.

Byrne v. Boadle (5) was a case of a jigger hoist, by means of which barrels were raised and lowered. A barrel fell on plaintiff. There was no evidence of the cause of the accident, either of defect in plant or negligent user of plant. *Scott's Case* (2) was similar. The plant there was a crane. In both the plant was used by defendants' servants. *Carpue's Case* (6), *Skinner's Case* (7), and

(1) 3 H. & C. 596, at p. 601.

(2) 3 H. & C. 596.

(3) L. R. 5 Q. B. 411; L. R.
6 Q. B. 759.

(4) I. R. 11 C. L. 30.

(5) 2 H. & C. 722.

(6) 5 Q. B. 747.

(7) 5 Ex. 787.

Flannery's Case (1) were similar in this respect. In all the accident was held prima facie evidence of the negligence. If the negligent user was eliminated, would it not remain proof of negligence in relation to the plant? The cases proceed on the basis that it was prima facie evidence of one or the other. If one is eliminated, does it not remain proof of the other? In these cases there was nothing to show whether the accident arose from the defective condition of the railway and train in *Carpue's Case* (2) and *Flannery's Case* (1), or the defective condition of the crane, chains, &c., in *Scott's Case* (3), or whether it was caused by the negligent user of those things which I have described by the word "plant." This is immaterial where the defendant is responsible for the state of the plant and the user is by the defendants' servants. In all these cases the accident arose out of the active user of the plant by the defendants' servants, and the Courts held that the accident was prima facie proof of the defendants' negligence, they being responsible both for the condition of the plant and the user thereof by their servants.

In the present case it arose out of the active user of the plant by the stevedore's servants, for whose negligence the defendants are not responsible. If the plaintiff's proof was confined to the fact that the bucket fell on him, this might have been equally consistent with negligence of the stevedore's servants being the cause. But the plaintiff's case went a step further. The defendant was responsible for the condition of the plant. The plaintiff proved that the plant was in a defective and dangerous condition, and there can be no doubt that this "materially contributed to the injury or death complained of." These are the words of Lord Watson's judgment in *Wakelin v. London and South-Western Railway Company* (4). This judgment was adopted by Lord Blackburn. I quoted the judgment at pp. 521-2 of *Gaffney v. Dublin United Tramways Company* (5), where I dealt with the question of "sole cause of the accident."

The question in this case is, therefore, whether the condition of the plant is prima facie evidence of negligence of the defendant company. It is a case where it is shown—1, that the accident arose

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(1) I. R. 11 C. L. 30.

(2) 5 Q. B. 747.

(3) 3 H. & C. 596.

(4) 12 A. C. 41.

(5) [1916] 2 I. R. 472.

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from a certain cause, not a case where the matter is left at large; and 2, that the defendant, and not the stevedore, is the person (if anyone is) responsible for this. How does proof of defective condition of the plant affect the burden of proof where it is proved that this defective condition was the cause of the accident?

In *Abrath v. North-Eastern Railway Company* (1), at p. 456, Bowen L.J. says:—"The test, therefore, as to burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given at a particular point of the case; for it is obvious that as the controversy involved in the litigation travels on the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner." "This point was reached in the present case at the close of the plaintiff's case. It was then proved—1. That the stay was defective. 2. That this materially contributed to the accident. 3. That the defect was in the iron of the stay, which had decayed through rust. 4. That this could not be discovered on inspection of the stay as it stood. Did this shift the onus of proof on defendants?"

I take the great case of *Readhead v. The Midland Railway Company* (2). There were three stages of proof in that case—1. The plaintiff proved the accident: train going off the rails. 2. The defendant proved that the cause of the accident was in the breaking of the tyre of one of the wheels owing to a defect in the welding. 3. That this was a latent defect in the tyre which was not attributed to any default on the part of the manufacturer, and could not be detected previously to the breaking. In the Exchequer Chamber the case was argued on a case stated. The plaintiff gave no evidence of negligence in relation to the tyre. Lush J., who tried the case, thus states the course of the trial. (The numbers are inserted by me to denote the three stages.) He says:—1, "The accident arose from the fracture of one of the wheels of the carriage; 2, the tyre of which had split into three pieces, owing, it was afterwards discovered, to a latent flaw in the welding; and

(1) 11 Q. B. D. 440.

(2) L. R. 2 Q. B. 412; L. R. 4 Q. B. 379.

3, it was proved on the part of the defendant that, at the commencement of the journey, the wheel was to all appearance strong and sound; that such a flaw in the welding may occur without any fault on the part of the manufacturer; that there were no means of detecting it beforehand; and that in fact the carriage had been examined, according to ordinary practice, before the train had started on the journey, and had answered to all the usual tests of soundness. I directed the jury that, if they believed the evidence, the defendants were not responsible for the accident, and they accordingly found their verdict for the defendants." This direction clearly shows that the judge held that the burden of proving 3 rested on the defendants. At stage 2 the case was in the same position as the present case at the close of the plaintiff's case, except that 3 in the present case is not to be found in *Readhead's Case* (1). The question discussed in *Readhead's Case* (1) was whether there was an absolute warranty of the safe condition of the plant; but no one thought of suggesting that proof that the defective tyre was the cause of the accident threw on the plaintiff the burden of proving that this defect could have been discovered if certain examinations had been made. The basis of the whole case was that once the defect was proved the burden was cast on the defendants to show that it could not have been discovered by any skill or care. If this were not so, it would have been unnecessary for the defendants to have gone on to stage 3. The only passage in the judgments expressly referring to onus of proof is at p. 427, where Mellor J. says: "The fracture of the wheel-tyre, by itself and unexplained, *might* (the italics here are mine) have been sufficient to raise a presumption of negligence against the defendants: *Skinner v. London and Brighton Railway Company* (2); *Carpue v. London and Brighton Railway Company* (3); *Bird v. Great Northern Railway Company* (4). But upon the direction of my brother Lush, when the explanatory evidence had been given [by the defendants] it must be taken to have been, in fact, found by the jury that the breaking of the wheel-tyre *was due to a hidden defect which no amount of care or skill could have discovered, either*

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(1) L. R. 2 Q. B. 412; L. R.

4 Q. B. 379.

(2) 5 Ex. 787.

(3) 5 Q. B. 747.

(4) 28 L. J. (Ex.) 3.

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 1917. whole case, that this "might" was unnecessary, that the burthen
 Coughlan of proof was cast on the defendants.

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 Monks. Taking *Flannery's Case* (1), we find, from analysis of the
 Ronan L. J. judgment of Palles C.B., that the case was one in which negligence
 of any of three classes would, if sufficiently connected with the
 injuries, be sufficient to maintain the action—1, negligence in the
 supervision or maintenance of the permanent way; 2, negligence
 in the supervision or maintenance of the waggon itself; 3, negli-
 gence in the driving of the engine; or the injuries might be due
 to, 4, inevitable accident. He goes on: "The sole question in
 the case is whether the jury might have legitimately drawn from
 the facts proved the inference that the waggon left the rails in
 consequence of defect in the wheel, defect in the rail, or mis-
 management of the engine." Evidence as to any of the first
 three would, in his view, be sufficient to cast the burden of proof
 on the defendants. If this be so, can it possibly be suggested
 that where it is proved as a fact that the waggon did leave
 the rail in consequence of defect in the wheel the burden of
 proof is not a fortiori cast on the defendants? The Lord Chief
 Baron, in terms, says that it would; and he applies to such a
 case the well-known rule that the burden of proof is cast on the
 party having special knowledge of the facts. But, in my opinion,
Kearney v. London, Brighton, and South Coast Railway Company (2)
 is a specific authority on the matter. In that case there was
 clear evidence that the accident was caused by the defective
 condition of the plant; there was no question of negligent
 user. As Cockburn C.J. said, at p. 415:—"We have the
 fact, the datum, that the brickwork was in a defective condi-
 tion. Where it is the duty of persons to do their best to keep
 premises or a structure, of whatever kind it may be, in proper
 condition, and we find it out of condition, and an accident happens
 therefrom, it is incumbent upon them to show that they used that
 reasonable care and diligence which they were bound to use."
 The dissenting judgment, delivered by Hannen J., represents the
 argument of the defendants in the case before us, and it would also

(1) I. R. 11 C. L. 30. (2) [1871] L. R. 5 Q. B. 411; L. R. 6 Q. B. 759.

support the judgment in *Hanrahan's Case* (1). The judgment of the Queen's Bench was unanimously affirmed by the Exchequer Chamber, consisting of no fewer than six judges, without calling on the respondent's counsel. Mr. FitzGibbon relied on this case as a conclusive authority in the present case. In my opinion he was right in so doing. The principle of the case is entirely in accordance with the principles of the judgment in *Flannery's Case* (2), though in the latter *Kearney's Case* (3) was not cited.

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On the authority of all the cases I have cited, apart from *Hanrahan's Case* (1) and the dicta of Willes J. in *Smith's Case* (4), I should have little doubt that the condition of the stay in this case was prima facie evidence of negligence, and threw on the person responsible for the condition of the stay the burthen of disproving negligence.

I now come to the cases relied on for the defendants. I think Serjeant Sullivan was right in starting with the dictum of Willes J. in *Smith v. Great Eastern Railway Company* (4), as it appears to me that the judgment in *Hanrahan's Case* (1) was an application of that dictum to the facts in *Hanrahan's Case* (1), and he argued that it applied equally to the facts of the present case. If I am right in the view I have taken of the authorities quoted above, the attempted application of that dictum to the present case is a striking example of the danger of applying isolated passages in a judgment without regard to the subject-matter of the case or to the rest of the judgment. The facts in that case were: At 9 p.m. a stray dog tore the dress of a lady passenger on a railway platform. He was not seen again until 10.30 p.m., when he attacked a cat in the signal-box near the station, when the porter kicked him out of the box; he ran along the line and got on the platform, where there was a crowd, and "where he immediately attacked and bit the plaintiff." It was with reference to these facts that the statement in the case was made, and the concluding words of the judgment show its application. The evidence did not show that "any opportunity of getting rid of the dog was neglected by the company's servants." It would seem plain enough that this has no

(1) 22 L. R. 1r. 55.

(2) 1 R. 11 C. L. 30.

(3) L. R. 5 Q. B. 411;

L. R. 6 Q. B. 759.

(4) L. R. 2 C. P. 4.

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possible application to a case like the present, but the judgment is very valuable, because, as if anticipating Serjeant Sullivan's argument, Willes J. proceeds to show how his judgment could not apply to this present case. He quotes the principle laid down in *Scott's Case* (1) referred to, and adds: "But that case is distinguishable from *Hammack v. White* (2) and this case, because there the defendants had in their possession and under their control something *which was dangerous* unless reasonable precautions were taken to prevent injury to third persons. *In such a case it is obvious that the damage must have arisen from some inadvertence or neglect of the defendant or his servants*; but the same principle cannot apply here, where the defendant had no control over that which is the immediate cause of the damage. This distinction is especially appreciable here, where the dog which bit the plaintiff was not the dog of the defendants, or one over which they could exercise any control except by turning it off their premises." This seems to me a complete adoption of *Scott's Case* (1), with the addition of the important words I have put in italics. The crane and chain in *Scott's Case* (1) are identical in principle with the "plant" in this case.

As to the dictum of Willes J. in *Daniel v. Metropolitan Railway Company* (3), which is in the same terms, Palles C.B. points out in *Flannery's Case* (4) that that case has no application whatever to a case like the present.

I now come to the case of *Hanrahan v. Ardnamult Steamship Company* (5). The main fact in that case was that the accident was caused by the breaking of a defective iron bolt. The greater part of this bolt, including the part where it broke, was concealed in the trestle tree, and the defect could only be ascertained by drawing it out. The facts as to the bolt are thus stated in the judgment: "It appears then that the death complained of resulted from the breaking of a bolt which—1, at the time was defective to the extent of two-thirds of its section or width; 2, that this defect was not visible unless the bolt was drawn out of the trestle tree;

(1) 3 H. & C. 596, at p. 601.

(2) 11 C. B. (N. S.) 588.

(3) L. R. 3 C. P. 216; L. R.

5 H. L. 45.

(4) L. R. 11 C. L. 30.

(5) 22 L. R. Ir. 55.

3, that it was not in fact drawn out or examined." 4. The captain of the vessel said: "I had no person skilled in iron work to look after screws and bolts, except that it was the general duty of the officers. No special examination was made." The circumstances of the case were in some respects different from the present. 5. The deceased was second mate of the steamer, not a stranger. It was a case of master and servant. 6. The accident occurred while the derrick was being hoisted up in order to be shackled to the mast for the discharge of cargo. 7. This operation was being carried out by the crew, under the direction of deceased. I shall examine the course taken in the case. I first take the pleadings, pp. 57, 58. According to the statement of claim, the bolt was "in an unsafe condition . . . which the defendant company well knew, or ought to have known." The defence was a denial of this, *inter alia*. Plaintiff's argument and cases cited; defendant's argument and cases except *Flannery's Case* (1) all dealt with the relation of master and servant. The judgment shows that the case really went on the basis above stated. I quote three passages from the judgment: 1, "There is no doubt that if the defendants knew, or ought to have known, of this condition of the bolt, there was evidence of negligence on their part in permitting the bolt to continue in that defective condition. And the question discussed before us was, whether there was any evidence from which the jury could reasonably have drawn the inference that this defective condition ought to have been within their knowledge"; again, 2, "and the question is whether it was for the jury to say that an inspection would have been a reasonable precaution, as unquestionably such inspection would have disclosed the defect"; 3, "the law upon the subject is beyond question. First, it was the duty of the defendants to use due care that a reasonably fit and proper bolt for supporting the derrick should be provided and maintained; but, secondly, it was the duty of the plaintiff to establish affirmatively a state of facts from which a jury might conclude by reasonable inference (as distinguished from speculation) that there was a breach of this duty, *viz.*: not that the bolt was in bad repair, but that the defendants did not use due care to maintain it in repair." Taking

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these two propositions, 1st and 2nd; the first states the law with the usual accuracy of the Lord Chief Baron. But contrast it with the second, that the plaintiff could only succeed by proof of negligence in maintaining in repair.

There was no case he was more familiar with than *Readhead v. Midland Railway Company* (1). The defendant might have bought the bolt a week before at a marine store dealer's second-hand. The defect might have been due to the neglect of the manufacturer. The defendant might have bought it without inspection, or employed an incompetent person to buy it and fix it, or the person employed for the purpose may have been negligent in buying or fixing. No one knew all this better than the Lord Chief Baron. The second proposition is only intelligible on the ground that the only case made by the plaintiff was the specific negligence mentioned in the second proposition. This view is strongly confirmed by quotations 1 and 2 above. It is difficult to believe that the Chief Baron was ever asked to say that the defective state of the bolt cast on the defendants the burden of proof that they had discharged the duty cast on them by the first proposition. Taking the specific case relied on, he arrived at the conclusion that expert evidence was necessary to establish it.

Hanrahan's Case (2) may possibly be distinguished from the present case on the following grounds:—1. That the case was decided on the special ground I have mentioned, and that the question of *res ipsa loquitur* was never raised. This I have dealt with. I shall only add that I replied for the defendants, and my only recollection is that I argued the necessity for expert evidence. 2. That it was a case of master and servant. It will be observed that none of the cases I have referred to except *Hanrahan's Case* (2) was a case of master and servant.

The rule as to *res ipsa loquitur* is contained in Article 751 at p. 439 of vol. xxi of Halsbury. Note (m) to that paragraph has this statement:—"The maxim *res ipsa loquitur* has no relation to master and servant cases where negligence on the part of the employer must be affirmatively proved": *Paterson v. Wallace* (3). This case was cited by plaintiffs in *Hanrahan's Case* (2). I cannot say

(1) L. R. 2 Q. B. 412; L. R. 4 Q. B. 379.

(2) 22 L. R. Ir. 55.

(3) 1 Macq. H. L. 748.

whether I raised this point. I do not think I did. If the note is correct, it of course entirely distinguishes *Hanrahan's Case* (1).

It is obvious that in the case of injury to a servant in the course of his employment the position of the defendant employer is quite different from his position in the case of injury to a person not in his employment. In a note to sect. 69, sub-s. 4, of the Indian Civil Wrongs Bill, in Pollock on Torts, 10th edition, p. 675, the author says:—"English common law authorities incline to the view that a servant injured by the defective state of the place where he is employed can hold the master liable only for personal negligence." There is a statement to the same effect in vol. xx of Halsbury, p. 131, final clause of Article 255 (Master and Servant).

In the last case I have found on the subject, *Toronto Power Company v. Paskwan* (2), Sir A. Channell, delivering the judgment of the Privy Council, says, at p. 738:—"If in the course of working plant becomes defective, and the defect is not brought to the master's knowledge, and could not by reasonable diligence have been discovered by him, the master is not liable."

In *Hanrahan's Case* (1), this view was considered. The second paragraph of the defence almost raises it in terms. I think I have said enough to show that in a master and servant case the alternatives are not inevitable accident or negligence on the part of the defendant, or of some one for whose negligence he is responsible to the plaintiff. There is the third alternative, viz., of negligence for which the defendant is not responsible, e.g. in *Hanrahan's Case* (1), negligence of fellow-servants, viz., the captain and other officers. In such a case, the principle of the cases I have cited would not apply. It seems to me on these grounds that *Hanrahan's Case* (1) can be distinguished from the present; but if it cannot, I am clearly of opinion, on the authority of all the other cases on the subject, that it should not be followed.

Burrell v. Tuohy (3) was referred to. It was not a case of master and servant. In that case, I advised the proofs with *Hanrahan's Case* (1) in my mind, and the plaintiff gave evidence of negligence in not testing the ring. *Hanrahan's Case* (1) is alluded to in the judgments, but there was no question of

(1) 22 L. R. Ir. 55. (2) [1915] A. C. 734. (3) [1898] 2 I. R. 271.

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burthen of proof. The only reference to that subject is in the judgment of Madden J., at pp. 283-284, where he says: "But if the ring gave way when subjected to no more than an ordinary strain it was plainly inadequate, and the burden is cast upon the defendants of proving that they had done all that in them lay reasonably to ensure efficiency of the buoy." So far as it goes, therefore, the case is a clear authority for plaintiff. There is nothing in the other judgments inconsistent with this.

It is obvious that the Lord Chief Justice had his attention called to *Hanrahan's Case* (1). It seems to me that he rather sought to distinguish it from the present case by his remarks as to the evidence relating to the mast. There is a passage in his judgment to which I refer to prevent a misconception. He says: "Probably few of the jury were experts in rigging; some of them were probably acquainted with wire ropes, or, at any rate, familiar with the vitality of wire; some may have had practical experience of metals, and with the specimen of the stay produced before them, it is impossible to say that they were not entitled to draw upon their experience to assist them on the really material question." Now, if there is one judge on the Bench who is familiar with the law on this subject, it is the Lord Chief Justice. He advised the proceedings, and obtained the conditional order in *R. v. Justices of Antrim* (2). He and I argued the case, and it is interesting, as we alleged, that a Lord of Appeal sitting at Petty Sessions as a magistrate supplied facts known to him to the other magistrates, and that the tribunal as a whole acted on them. See the judgment of Johnson J., at pp. 647 to 652.

The case cited in all the text books as stating the law in relation to juries is *R. v. Rosser* (3). A prisoner was indicted for stealing a watch and seals of the value of £7. (Two judges were presiding, as was the case formerly in Green Street.) A witness swore they were worth £7. "The jury after the summing up inquired if they were at liberty to put a value on the property themselves." "Vaughan J. If you see any reason to doubt the evidence you are at liberty to do so. Any knowledge you have on the subject you may use. Some of you may, perhaps, be in the trade." Parke B.: "If a gentleman is in the trade he must

(1) 22 L. R. Ir. 55.

(2) [1895] 2 I. R. 603.

(3) 7 C. & P. 648.

be sworn as a witness. That general knowledge which any man can bring to the subject may be used without; but if it depends on any knowledge of the trade the gentleman must be sworn." This statement of Parke B. has always been accepted as the law, and it applies to judges as well as to juries. I am quite sure the Lord Chief Baron never meant anything inconsistent with it.

I have referred to the matter in detail as, personally, I find great difficulty in dealing with the question of the mast. In a small yacht I once had we found the mast at the corresponding place quite rotten as to more than one-third of its substance. I know how it was discovered, and whether it was apparent on the surface. In the present case the decayed portion was only one inch deep, and was only at the back of the mast. The section of the mast was forty-nine inches, so that it was only a very small fraction of the entire. I examined the fragments produced, which did not half fill a small envelope. I know that masts such as this are either painted or greased and varnished; generally painted where there are no hoops of a sail running on the mast, as in this case. With all this special knowledge I have formed a very clear opinion as to whether there is reasonable ground for finding that the defect was visible on the surface.

We are sending the case to a new trial. I find it impossible to divest my mind of the special knowledge, so I think the best thing I can do is to express no opinion on the question. I think it is unnecessary to do so for the following reasons:—Let us assume that there was some evidence of negligence as regards the mast, but none as regards the stay. Is there any evidence that the accident would have happened if the stay had not broken? Plainly none. Is there any evidence that when the stay broke the accident would not have happened if the mast had been sound, or that the stay would not have broken if the mast had been sound? Plainly none. It is obvious that the facts are at least equally consistent with the view that the defective stay was the real and sole cause of the accident. If, then, there was no evidence of negligence as to the stay, the facts were at least equally consistent with the accident having arisen partly from the negligence of the defendants (the mast) or exclusively from a cause other than the negligence of the defendants (the condition

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Appeal. of the stay), and therefore the case should not have been left to
 1917. the jury. It was therefore necessary for the plaintiff to show
 COUGHLAN that there was evidence of negligence as to the stay.

v.
 MONKS. I am of opinion that the rule *res ipsa loquitur*, and that of the
 ——— burthen of proof being on the party within whose knowledge the
 Ronan L.J. matters lie, apply in this case and rule it, and that the appeal
 should be dismissed.

MOLONY L.J. :—

The defendant's steamer arrived at Cork with a cargo of coal consigned to the Cork Gas Company. Under the charter-party the cargo was to be discharged by the consignees, the steamer giving the use of steam winches and the necessary gear. The Gas Company entered into an agreement with Peter Halloran, a stevedore, to discharge the cargo, and he employed twenty-four men—including Daniel Coughlan—for that purpose.

Daniel Coughlan was working in the hold, when suddenly the wire stays supporting the mast snapped, the mast broke, the derrick fell on him and unfortunately caused his death. Evidence was given at the trial by the stevedore that both the stay and the mast were rotten, and this evidence was corroborated by Sergeant Hayes, R.I.C., and Ernest Allhusen, Factory Inspector for the Cork District, and specimens were produced in Court of part of the mast and of the stay to bear out this evidence. Evidence was also given to the effect that the defects could not be noticed prior to the accident, but there was also some evidence that the rot extended for an inch in depth where the mast entered the socket, and where apparently it could have been seen.

In this state of facts the only question is as to whether there was evidence proper to be submitted to the jury of negligence on the part of the defendants. The learned judge came to the conclusion that there was no such evidence of negligence, and directed a verdict for the defendants; and the question is, can this ruling be sustained? It is, however, clear that it was incumbent on the defendants to provide gear reasonably sufficient for the purpose of discharging the vessel, and to take all proper and necessary steps to maintain it in good order and condition. We have evidence that the gear was defective, and that the accident was caused by the

defect, and this is sufficient to throw upon the defendants the burden of showing that the defect was one for which they were not to blame.

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It seems to me that the case must be considered as coming within the rule laid down by the Exchequer Chamber in 1865 in *Scott v. The London Dock Company* (1): "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose through want of care."

In *Kearney v. The London, Brighton, and South Coast Railway* (2), where a brick fell from a railway bridge on the plaintiff as he was passing under the bridge, the fact of the brick falling was held to be *prima facie* evidence from which the jury might infer negligence on the part of the defendants. Cockburn C.J. said:—"We have the fact, the datum, that the brickwork was in a defective condition, and we have it admitted that it was the defendants' duty to use reasonable care and diligence to keep it in a proper condition. Where it is the duty of persons to do their best to keep premises or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was a defect from which the accident has arisen. Therefore, there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts."

In *Flannery v. The Waterford and Limerick Railway Company* (3) it was proved that the plaintiff sustained injuries in consequence of portion of the train in which she was travelling having left the rails, and the railway, the engine, and the carriages were under the defendants' management, and it was held that the

(1) 3 H. & C. 596. (2) L. R. 5 Q. B. 411. (3) I. R. 11 C. L. 30.

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fact of the accident was sufficient evidence to cast upon the defendants the burden of showing that there was no negligence on their part. Palles C.B., having referred to the case of *Scott v. The London Docks Company* (1), said:—"I entirely subscribe to the doctrine laid down in *Scott v. The London Docks Company* (1) as applied to cases like that and the present, in which the facts lie more in the knowledge of the defendants than of the party injured. Applying it to the facts before us, I am of opinion that as the railway, the engine, and the waggon were under the defendants' management, and as the circumstance of the waggon leaving the rail does not happen in the ordinary course of things if due care is used, the fact of the accident was sufficient evidence to call upon the defendants to show that there was no negligence on their part; and as they declined to afford any explanation of the cause of this unusual occurrence, the case was rightly left to the jury." I think, therefore, that there was evidence proper to be submitted to the jury in support of the plaintiff's case; but as there must be a new trial, I purposely abstain from commenting on the evidence in detail.

The defendants have endeavoured to support the finding of the learned judge on the authority of *Smith v. Great Eastern Company* (2) and *Haurahan v. The Ardnamult Steamship Company* (3). As these cases have been fully dealt with by the Lord Chancellor and Lord Justice Ronan, I do not think it necessary to say more than that I agree with them in their comments.

Solicitors for the appellants: *J & G. Bennett.*

Solicitor for the respondent: *J. M'Cabe.*

C. L.

(1) 3 H. & C. 596, at p. 601.

(2) L. R. 2 C. P. 4.

(3) 22 L. R. Ir. 55.

R. (WILBOND) v. ARMAGH JUSTICES (1).

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Feb. 25.

Justices—Jurisdiction—Petty Sessions—Form of Order—Cases within the Petty Sessions Act—Omission to state whether dismiss “without prejudice” or “on the merits”—Certiorari—Prosecution by Police constable—Power to give costs against—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 21.

An order of dismissal under sect. 21 of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), is not invalid because it does not state whether the dismissal is “without prejudice” or “on the merits.” The provision of the section requiring this to be stated is merely directory.

Where a police constable sues as a common informer, there is jurisdiction to give costs against him, but in most cases the Court ought not to take this course.

APPLICATION to quash the orders and adjudications of the justices mentioned in an absolute order for certiorari, dated the 10th January, 1918. The orders and adjudications were made at Portadown Petty Sessions on the 28th May, 1917, on the hearing of a complaint designated “Thomas Reilly, Sergeant, R.I.C., complainant; Thomas James Peacock, defendant”: that defendant, at Portadown, on the 17th April, 1917, did cruelly ill-treat a horse, by working the animal while suffering from a sore, contrary to law.

The following order was made by the justices upon this complaint:—“Case dismissed, and complainant ordered to pay for costs the sum of twenty shillings, and in default of payment to be levied off his goods legally liable thereto by distress, warrant not to issue for seven clear days.”

On the 29th October, 1917, a conditional order to quash the conviction was made, on the application of the prosecutor, on the following grounds:—

1. That the order dated the 28th May, 1917, was made without jurisdiction.
2. That the said order was made in excess of jurisdiction.
3. That the said order was bad in so far as it awarded costs

(1) Before GIBSON, MADDEN, and KENNY JJ.

K. B. Div. against the complainant, being a member of the Royal Irish Constabulary, acting in discharge of his duties as a police officer.
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4. That the said order was bad as not stating whether the summons was dismissed without prejudice or on the merits.

No cause having been shown by the justices or the defendant, the conditional order was made absolute. On the application coming before the Court on concilium to quash the justices' return, as there had been no appearance for the justices or the defendant, the Court suggested that counsel should be brought in by the Crown to argue the case as on behalf of the justices, and this course was adopted.

Serjeant M'Sweeney and S. L. Devitt, for the prosecutor:—

The jurisdiction of justices at Petty Sessions is purely statutory. The statute substitutes a brief form of order for the more cumbrous form which the common law would require, which should show complete jurisdiction on its face. The statutory order is, therefore, not merely directory but mandatory, and must be strictly followed. The present order is bad on its face: *Great Southern and Western Railway v. Darby* (1); *Donnelly v. Ingram* (2); *R. (Bridges and Ram) v. Armagh Justices* (3); *Ex parte Conybeare* (4).

There is no jurisdiction to award costs against a member of the Royal Irish Constabulary. He prosecutes in every case on behalf of the King. He is appointed, dismissed, and controlled by the Lord Lieutenant, and as such acts in all cases as the servant of the Crown: *R. v. Thomas Beadle* (5); Constabulary Act of 1836 (6 Wm. 4, c. 13), sects. 5, 6, 7, 11.

Rearden, on behalf of the justices:—

"Dismiss" primarily means "dismiss on the merits": *R. (Walsh) v. Tipperary Justices* (6), per Gordon J., at p. 257. Before the Petty Sessions Act such a thing as "dismiss on the merits" was unknown in criminal procedure. An order is, there-

(1) 27 I. L. T. R. 45.

(2) 31 I. L. T. R. 139.

(3) [1897] 2 I. R. 236.

(4) Judgments of the Superior Courts in Ireland, pp. 324, 327.

(5) 7 E. & B. 492.

(6) [1917] 2 I. R. 250.

fore, not bad on its face because the words "without prejudice" or "on the merits" do not appear in it.

A police constable is in the same position as any other common informer. There is power to award costs against him.

Cur. adv. vult.

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The judgment of the Court was delivered by

GIBSON J. :—

Feb. 27.

This case comes before us to quash on return to certiorari in relation to a dismiss in a prosecution by Sergeant Reilly against James Peacock for cruelly ill-treating a horse. The dismiss was with 20s. costs against the complainant, and does not state whether it was on the merits or without prejudice, as required by sect. 21 of the Petty Sessions Act, under which the prosecution was brought. Two points are before us for decision. The first is, was there jurisdiction to award costs? If there was not, that portion of the order, being severable, could be quashed without affecting the rest of the dismiss: *Reg. v. Cassidy* (1). We must decide that the police officer, though performing what he considered to be his duty, was in legal quality a common informer against whom there was jurisdiction to give costs, though in most cases the Court ought not to make the officer pay costs, thereby discouraging him in the discharge of his duty. To decide otherwise would be a complete departure from settled practice.

The second question, noticed but not decided in *R. (Walsh) v. Tipperary Justices* (2), is whether non-compliance with sect. 21 of the Petty Sessions Act invalidates the dismiss in such a way as to entitle the complainant to have it quashed on certiorari. The affidavit before us does not disclose the evidence given on either side or why the complaint was dismissed at the hearing, whether on the merits or otherwise. The question of the effect of this omission to describe the character of a dismiss has been the subject of legal controversy, but there has been hitherto no binding authority, and we have therefore considered the matter with care, assisted by the arguments on both sides.

Up to the Petty Sessions Act, a dismiss in Ireland, as in England (under 11 & 12 Vict. c. 43, sect. 14), was pronounced

(1) 6 L. C. L. R. 436.

(2) [1917] 2 I. R., 250.

K. B. Div. simpliciter, not specifying whether it was on the merits or without
 1918. prejudice, and such general form of dismiss is still appropriate in
 R. cases not governed by the Petty Sessions Act. The result was
 (WILBOND) that such dismiss might be shown not to be final: O'Connor,
 v pp. 257, 258, where many cases on the point are cited, to which I
 ARMAGH add *Reed v. Nutt* (1). Sect. 21 requires the dismiss to be either
 JUSTICES. upon the merits or without prejudice, and the record in the order
 Gibson J. book is so to state. The enactment follows the analogous provision
 in the Civil Bill Act passed shortly before (14 & 15 Vict. c. 57);
 sect. 111 of that Act directs the dismiss to be with costs, and to be
 either without prejudice or on the merits. Would the omission to
 give costs, or to state the character of such civil-bill dismiss, make
 it invalid and without jurisdiction? Little if any help can be got
 from the text-books on statute law. Our duty is to discover from the
 very words and object of the Act, whether it is the intention to
 compel or to direct: *Reg. v. Justices of County of London* (2), per
 Bowen L.J. Was the insertion of the description "on the merits" or
 "without prejudice" an essential condition to the validity of the
 dismiss? or was the matter one of form of a directory character? If
 the omission made the dismiss a nullity, a piece of paper, without
 jurisdiction on its face, not only would the enforcement of costs
 found a civil action, but the complainant would be enabled to
 begin de novo, thus being in the same position as if the dismiss
 (which might have been in fact on the merits) had been without
 prejudice, and with the added advantage that he was to pay no
 costs of such dismiss.

Section 20, sub-s 3, is silent as to the words found in sect. 21,
 and I need not consider it. Sect. 21 comprises civil as well as
 criminal complaints. At the hearing, it would seem, on the one
 hand, the duty of the complainant to have the nature of this
 dismiss defined, particularly if he wished to bring his case on
 again; and on the other, the obligation of the Court to announce
 whether this decision was final or not. If from oversight the
 proper formula was not used in announcing the decision, or if by
 a slip it was not recorded, is the omission to cancel the hearing
 and evidence, and make the whole proceeding as if it had been
 without jurisdiction? If the word "dismiss," standing alone, is

(1) 24 Q. B. D. 669.

(2) [1893] 2 Q. B. 476, at p. 491.

ambiguous, it would seem to suggest rather a final adjudication than a decision which would enable the complainant to begin afresh—an exceptional privilege. Whether “dismiss” should be so construed, or whether its character could be explained in the way described in *O'Connor*, at pp. 257 and 258, we need not now decide, if the order in its present shape was not without jurisdiction. We think it was not. In *Stevenson v. O'Neill* (1), Palles C.B., dealing with a case stated in reference to an order “no rule,” said: “The fact that that determination is erroneous in form cannot deprive the party of his right to have a case stated.” He adds:—“Were we to hold otherwise, justices who in substance had dismissed a complaint might, by the form of their entry, deprive the party of his statutable right to take the opinion of one of the superior Courts.” He thus treats the matter as one of form.

I should add that (though this is not the ground of our decision) in a case like the present, I am not satisfied that this Court, without knowing the evidence, and without information as to the actual oral dismiss, ought to quash for such a defect; if the prosecutor was aware of it and if he wished to renew the prosecution, he ought to have required the Court explicitly to state the nature of the dismiss in a criminal as well as in a civil complaint. The course of the hearing would usually indicate the meaning of the dismiss, whether it was to be final or otherwise. The case is by no means the same as that of a conviction, as to which the defendant was under no obligation to keep the proceeding or order regular in form.

There is no decision which prevents the Court from acting on its own opinion, now that the matter has been fully argued and for the first time considered in banc. The language attributed to O'Brien J., in *Great Southern & Western Railway v. Darby* (2), on an ex parte application does not represent his considered opinion. In *R. v. Armagh Justices* (3), he expressly states that the dismiss was not a nullity. That case was mistakenly supposed to be within the Petty Sessions Act. The circuit decision of the Chief Baron in *Donnelly v. Ingram* (4) (of which only the result, not the reasoning, is reported) was right, as, the action being for assault, the dismiss

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(1) I. R. 11 C. L. 134, at p. 137.

(2) 27 I. L. T. 45.

(3) [1897] 2 I. R. 236.

(4) 31 I. L. T. 139.

K. B. Div. would only have been a defence if it had been on the merits: 1918. *Reed v. Nutt* (1). In any case, from judicial comity, Palles C.B. would have probably acted on the recent pronouncement of a judge exercising jurisdiction in certiorari at that time confined to the Queen's Bench Division.

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Looking at the entire legislation, that before 1851, that in England, the Civil Bill Act, and the Petty Sessions Act, we cannot construe sect. 21 as meaning that disregard by magistrates of the statutory direction, when giving judgment or in filling up the record, is to operate to the prejudice of the litigants by wholly invalidating the adjudication.

This decision must not encourage justices to laxity. They should obey the statute, and failure to do so may expose them to unpleasant consequences, such as mandamus or otherwise, resulting from violation of their obligation.

No question was raised as to certiorari being inapplicable to a dismiss. If such dismiss awarded costs wrongly, such peccant part obviously could be quashed. As to the other fault in the order, the position may not be quite the same. No such point was made, and I do not deem it necessary to consider it.

Solicitor for the prosecutor: *The Chief Crown Solicitor.*

A. E. C.

HOUSTON GRAHAM, PLAINTIFF, *v.* J. CAMPBELL
M'ILWAINE, DEFENDANT (1).

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1918.

Feb. 7, 11,
12.

Landlord and tenant—Notice to quit—Notice by equitable owner invalid.

A purchaser, whether in the open market or from the Land Judge's Court, who between the payment of the purchase-money and the execution of the conveyance, serves in his own name a notice to quit on a tenant of the lands purchased, cannot by such notice validly determine the tenancy. In such circumstances the notice to quit, to be valid, should be signed by both the vendor and purchaser or, at all events, by the purchaser as the expressly authorized agent of the vendor.

CASE STATED under 27 & 28 Vict. c. 99, sect. 35.

This was a case stated by Madden J. at the Summer Assizes, 1917, for the county of Tyrone, on an appeal against a decree in ejectment made against the defendant by the County Court Judge of that county. The facts and matters stated in the case may be conveniently summarized as follows:—

The lands in respect of which the ejectment was brought formed portion of an estate sold in the Land Judge's Court under the Partition Acts, and were described in the rental in the Land Judge's matter as "Lot 1. Part of the lands of the Holme of Strabane, known on the Ordnance Survey as part of the townparks of Strabane, held by the representatives of Mathew M'Swiggan, under a tenancy from year to year." The defendant, on the 23rd July, 1915, purchased from the representatives of M'Swiggan the tenant's interests in the above lands, lot 1 on the rental, and, the sale by auction of the lands in the Land Judge's matter having been abortive, the plaintiff's private offer of £221 was accepted, and the sale of the lands in the matter, including lot 1, to the plaintiff was confirmed on the 8th November, 1915. On the 22nd December, 1915, the plaintiff lodged the purchase-money in the Bank of Ireland to the credit of the Land Judge's matter, and, on the 29th April, 1916, he

(1) Before GIBSON and PIM JJ.

K. B. Div. served upon the defendant a notice to quit in the following
 1918. form:—"I hereby give you notice, and require you to quit and
 GRAHAM deliver up to me, my agent or bailiff, on the 1st day of
 M'ILWAIN. November next, the possession of the lands and tenements which
 you hold as tenant of or occupy under me, situate in the town-
 parks of Strabane, barony of Lower Strabane, and county of
 Tyrone.—Houston Graham." On the 4th August, 1916, the
 Landed Estates Court Conveyance to the plaintiff was executed,
 and, in the habendum of that deed, the lands conveyed were
 expressed to be held subject to the tenancy in the schedule to the
 conveyance, the tenancy being that of the defendant in the
 premises described as lot 1 on the rental. It was admitted that
 the tenancy purchased by the defendant commenced prior to
 the 15th August, 1875, the date of the passing of the Notice to
 Quit (Ireland) Act, 1876. On the 29th December, 1916, the
 plaintiff brought a civil bill for ejectment for overholding, upon
 which he obtained the decree appealed from.

The question submitted on the case stated for the opinion of
 the Court was as follows:—"Was the tenancy of the defendant
 duly determined upon the expiration of the notice to quit of the
 29th April, 1916?"

As the decision of the Divisional Court was based upon the
 general law, it is not thought necessary to embody in this report
 the sections and regulations relative to the procedure in the Land
 Judge's Court which were referred to in the arguments.

Babington (with him *Wylie K.C.*), for the defendant:—

A notice to quit given by an equitable owner is not sufficient.
 The person who can determine the tenancy by notice is the
 "person entitled to the reversion": *Cole on Ejectment*, p. 42;
Foa's Landlord and Tenant, p. 476; *Halsbury, Laws of England*,
 vol. xviii, p. 451. In *De Moleyns' Landowner's Guide*, p. 230,
 the person entitled to give a notice to quit is stated to be the
 person entitled to rent. The plaintiff here, at the date when the
 notice was given, was no more than an equitable owner; he was
 not legally entitled to the rent: *Landed Estates Court (Ireland)*
Act, 1858 (21 & 22 Vict. c. 72); *Rules of 1859*, rule 36 (*Madden*
and Jellett, pp. 82 and 140). The difficulty of the plaintiff's

position in relation to the defendant appears to have been appreciated by the plaintiff's advisers. The form of the notice requiring the defendant to give up possession of the lands he held "as tenant of" or "occupied under" the plaintiff suggests a doubt as to whether the defendant was a tenant. Until the plaintiff obtained his conveyance, the right of the Court to determine the tenancy remained; though, probably, after the confirmation of the sale the Court would not have determined the tenancy without the plaintiff's request or assent. The plaintiff could have acted through the Court. It is clear he did not do so, as the tenancy is set out as existing in the schedule to the conveyance. In *Jones v. Phipps* (1) it was held that a tenant for life could not determine a tenancy without the trustees; and Lush J., in his judgment, appears to assume that the legal estate was necessary to found a valid determination. Apart from the statute a mortgagor could not determine tenancies without the concurrence of the mortgagee: *Miles v. Murphy* (2). Sect. 28, sub-s. 5, of the Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), gives the mortgagor an express statutory power to determine tenancies by his own act. *Antrim County Land and Building Society v. Stewart* (3) deals only with the right of a puisne mortgagee to possession. The plaintiff here was never entitled to possession until the conveyance to him was executed: *Casper v. Small* (4). Up till conveyance the only rights are between vendor and purchaser, and not rights as between the purchaser and third parties. *Tasker v. Small* (4) is approved of in *De Hoghton v. Money* (5). No notice to quit could be valid before conveyance unless signed by both vendor and purchaser, or by the purchaser as the expressly authorized agent of the vendor: *Lauder v. Alley* (6). The form of the habendum of the conveyance sets up the tenancy, whether the notice to quit was good or bad: *Bergin v. Warburton* (7); *Corless v. Sparling* (8). There is here an estoppel. There could be no surrender of the tenancy.

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(1) L. R. 3 Q. B. 567.

(2) L. R. 5 C. L. 382.

(3) [1904] 2 I. R. 357.

(4) 3 Myl. & Crg. 63.

(5) 2 Ch. A. 164.

(6) L. R. 1 C. L. 82.

(7) 13 I. C. L. R. 137.

(8) L. R. 9 Eq. 595.

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E. S. Murphy and Denis Henry K.C., for the plaintiff :—

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Under rule 32 the plaintiff is deemed to be owner of the lands purchased as from the date of the confirmation of the purchase; rule 36 only applies to untenanted lands and to attornment by tenants. Section 1 of the Landed Estates Court (Ireland) Act, 1858 (21 & 22 Vict. c. 72), defines owner as including any person beneficially entitled in possession at law or in equity, and the plaintiff was clearly an equitable owner at the date of the service of the notice to quit. *Antrim County Land and Building Society v. Stewart* (1) is conclusive that an equitable owner, since the Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), can determine a tenancy. Palles C.B. in his judgment, dealing with the effect of that statute, says :—"Where the plaintiff claims to be entitled to any right—such as here the right of possession to land—by virtue of an equitable estate, the High Court, whatever may be the division in which the suit may happen to be, must, so long as the suit remains in the division, give the same relief as ought to have been given by the Court of Chancery in a suit properly instituted for the like purpose before the Act."

The service of the notice did not determine the tenancy there and then: *Boyd v. Phelan* (2); *Tayleur v. Wildin* (3); and there was no estoppel by the form of the conveyance, nor waiver of the notice, since waiver required the assent of both parties: *General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society* (4); *Inchiquin v. Lyons* (5); *Murtagh v. Adamson* (6); *Staples v. Bell* (7); *Walsh v. Lonsdale* (8); *Bergin v. Warburton* (9).

Wylie K.C., in reply :—

The difficulty in the case arises from confusion as to the meaning of "entitled to possession"; that expression may only relate to possession as against a particular person, e.g. a vendor. Palles C.B. in *Antrim County Land and Building Society v. Stewart* (1) did not intend to decide, and did not in fact decide,

(1) [1904] 2 I. R. 357.

(5) 20 L. R. Ir. 474.

(2) 14 L. R. Ir. 232.

(6) 2 I. L. T. 170.

(3) L. R. 3 Ex. 303.

(7) 21 I. L. T. R. 28.

(4) L. R. 10 Ch. D. 15.

(8) L. R. 21 Ch. D. 9.

(9) 13 I. C. L. R. 137.

that every equitable owner was entitled to determine a tenancy by notice to quit. The plaintiff here was not entitled to go into possession; he was only at liberty to invoke the assistance of the Court.

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Cur. adv. vult.

GIBSON J. :—

This case brings before us for decision three questions:—

1. Can a purchaser after payment of purchase-money, but before conveyance, serve a valid notice to quit under the Judicature Act?
2. Is capacity to give such notice conferred, preserved, or affected by the Landed Estates Court legislation, rules, and procedure?
3. If such notice would have been effectual to determine the tenancy, does the description of the tenancy in the schedule to the conveyance, as being from year to year, deprive the notice of effect, on the ground that such notice altered the quality of the tenancy and converted it into a tenancy for a term, so that the legal description in the deed must prevail?

1. Though an equitable estate is, in some circumstances, sufficient to support an ejectment, as in *Antrim County Land and Building Society v. Stewart* (1), and an equitable assignee may sue, as in *Langtry v. O'Rourke* (2), *Conlan v. Carlow County Council* (3), there does not appear to be any instance where the principle has been extended to the purchaser of real estate. Though the vendor is on the way to becoming trustee, still, while the contract is in fieri, he is not properly a trustee, as is explained by Lord Hatherley in *Shaw v. Foster* (4), and by Farwell J. in *Ridout v. Fowler* (5). When, however, the contract is performed in everything but the formal act of sealing the deed, the purchaser may be entitled, as against the vendor, to possession or to use his name as trustee for the purpose of enforcing or protecting the proprietary rights of the purchaser, and, if necessary, to invoke the assistance of the Court—a situation not now before us. But, against third parties outside the contract, who may be unaware of the sale or the performance of the conditions leading up to completion, I think that the purchaser cannot maintain an action in his own name and without the legal

(1) [1904] 2 I. R. 357.

(4) L. R. 5 H. L. 321, at p. 356.

(2) 39 I. L. T. R. 80.

(5) [1904] 1 Ch., at p. 661.

(3) [1912] 2 I. R. 535.

K. B. Div. owner as a party. The machinery of Deasy's Act, in such provisions as sects. 12, 13, and 14, and elsewhere in the statute, as to the transfer of the contractual rights and liabilities of landlord and tenant respectively, assumes and requires legal ownership on both sides. A purchaser of a tenant's interest could not before such tenancy was vested in him by assignment or estoppel be made answerable for the rent merely because he had agreed to buy, nor could he execute a valid surrender. A covenant running with the land does not attach to two estates, one legal, the other equitable, so as to vest rights of action in both owners concurrently. In case of a lease with a forfeiture clause for continuing breach of a covenant to repair, as in *Penton v. Barnett* (1), how could the purchaser from the landlord serve, under sect. 14 of the Conveyancing Act, an anticipatory notice, even though the time fixed by such notice would not expire till after conveyance?

2. The Landed Estates Court legislation does not help the plaintiff; it rather tells against him. Rule 32 declares that the purchaser is to be deemed owner; but this is before payment, and plainly means only that, if and when the sale is completed, he is to enjoy all the benefits of ownership from the date of his purchase. Sects. 63 and 87 show that conveyance is regarded as an essential preliminary to enforcement of rent, &c., against tenants. Until the deed is executed the estate is under the control of the Court, whether there is a receiver or not. It may be that where prompt action was necessary in the purchaser's interest he might, in special circumstances, if conveyance was delayed, apply to be appointed receiver or obtain an order authorizing proceedings; but without such Court authority a tenant, who, after the rental is settled, has no further concern with the sale, could not be expected to act on a notice issued by a person of whose rights he had no official cognizance. A notice must be such that a tenant can safely act on it: *Doe v. Goldwin* (2). A sale might be set aside or the purchaser discharged for many reasons. Until the legal ownership is changed or an official direction is given by the Court, the tenant is not called on to recognize the purchaser as his new landlord. The notice to quit here given by the plaintiff does not even purport to be by him in his character of purchaser. The

(1) [1898] 1 Q. B. 276.

(2) 2 Q. B. 143.

case stated does not disclose any knowledge on the part of the defendant as to the plaintiff's having bought, though such knowledge would not, in my view, affect the result.

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As my conclusion is against the validity of the notice, it is unnecessary to consider the point as to the description in the conveyance, which plaintiff's counsel contend represents correctly the tenancy from year to year in quality, though its value and duration were affected.

MILWAINE.
Gibson J.

The question put must be answered negatively, and the decree will be reversed.

PIM J. :—

I agree, and only desire to add a few words. A number of cases have been cited to us to prove that an owner in equity is entitled to bring an ejectment although the legal estate is outstanding: *The General Finance, Mortgage, and Discount Company v. Liberator Permanent Benefit Building Society* (1); *Walsh v. Lonsdale* (2); and *Antrim County Land and Building Society v. Stewart* (3). These cases do not seem to me to decide the question before us at all. What they decide is that an owner in equity, who has the right to possession against the defendant (in Lord Justice Holmes' words, "who is entitled in equity to possession"), ought not to be refused his right to be put in possession on the sole ground that he is not clothed with legal estate.

In this case, however, the plaintiff had no right of possession when he served the notice to quit. He might possibly have applied to the Land Judge on special grounds to be put into possession, and possibly, under his inherent jurisdiction as a judge of the Chancery Division, the Land Judge, if he had deemed it expedient, might have put him into possession; but that would not have been "as of right" but "as of expediency." Test the case in this way: Suppose the Landed Estates Court conveyance had not been executed for three months later than it was in fact executed; the term under the notice to quit would in the meantime have run out; the purchaser would have had no right to go into

(1) 10 Ch. Div. 15.

(2) 21 Ch. Div. 9.

(3) [1904] 2 I. R. 357.

K. B. Div. possession without an order of the Land Judge, and non constat
1918. that might have been refused—indeed, must have been refused—
GRAHAM unless there were very strong reasons for granting it.
v.
M'ILWAINE. In my opinion, the plaintiff fails on the ground that he had no
Pim J. right to possession.

Solicitors for the plaintiff: *Moody & Magee.*

Solicitors for the defendant: *Elliott & Clarke.*

C. N. K.

FLANAGAN v. FAHY.

K. B. Div.

1911.

Practice—Evidence—Cross-examination—Fabrication alleged against witness—

Feb. 21, 22,

Previous statement by witness—Admissibility—New trial motion—Order 39,

23.

*rule 7—Exclusion of shorthand note of Judge's charge to jury.**Appeal.*

Oct. 31.

Nov. 1, 2, 5,
6, 19.

In a suit to establish a will, one of the witnesses for the defendants stated that the will was written immediately after the death of the deceased, that he had been invited, on behalf of the plaintiff, to put his name to it as a witness, and that he was given or offered a bribe to secure his silence. The cross-examination of this witness was directed to prove hostility between him and the plaintiff's family, and the suggestion made was that from motives of malice he had fabricated the story told in Court. On re-examination the witness was asked whether he had not told his employer M the same story the day after he had been approached in reference to the signing of the will. M was called, and proved that the impeached witness had told him, a few days after the death of the deceased, substantially the same story.

Held (affirming the King's Bench Division), that this evidence was properly admitted on the ground that where a witness is charged with a design to misrepresent in consequence of his relation to a party or to the cause, it may be shown that he made a statement similar to his present testimony before that relationship existed.

Held, by Court of Appeal, that the Court will not look at the transcript of a shorthand writer's note of a judge's charge unless incorporated in the judge's report or adopted by him.

NEW TRIAL MOTION in an action to establish the will of Patrick Flanagan, deceased. The defence relied upon was that the will had been forged. At the first trial, before Gibson J., an issue of forgery was left to the jury. There was a disagreement of the jury on that occasion. On the occasion of the second trial no direct issue of forgery was left to the jury, but an issue was left to them as to whether the will was duly executed in accordance with the provisions of the statute.

A witness called Patrick Ryan was examined on behalf of the defendants to prove that the plaintiff Tim Flanagan and his brother Tom Flanagan of Glanquin had asked him to sign his name as a witness to a forged will of Patrick Flanagan, which the plaintiffs were engaged in preparing, and that they had offered to bribe him with a present of sheep for doing so.

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The witness was cross-examined by Comyn K.C., on behalf of the plaintiffs, as to a number of convictions recorded against him for drunkenness and acts of violence, and as to whether Gibson J., on the first trial, had not stated of the witness to the jury—"I would advise you to regard with intense distrust the evidence of Ryan," and, "If I had the conduct of the defendant's case I would imagine I would be much better without Ryan"; he was also asked a number of questions as to the circumstances of the alleged interview with the plaintiff and his brother. In the course of cross-examination by Comyn K.C., the following questions were put:—

1036. "Tell me, were you on 1st March, 1906, summoned to the Petty Sessions in Corofin for unlawfully presenting a revolver at the testator, and threatening to blow his brains out? Was that complaint made against you?" "It was made against me, but it was false."

1037. "Did you settle the case?" "He settled it himself."

1038. "Were you summoned also on the 22nd March, 1909, for assault on Thomas Flanagan—were you?" "I might have been, he having blackguarded me greatly."

1039. "Were you convicted?" "I would not say I was convicted."

1040. "Were you convicted on the evidence and ordered to pay 5s., and for costs the sum of 1s.?" "I was, when he blackguarded a sister of mine when I met him on the public road."

1041. "Were you again convicted for having on March 22nd, 1909, assaulted Tim Flanagan?" "It is likely I did; I asked him would not he marry my sister?"

The witness was re-examined by Lynch K.C., as follows:—

1115. Mr. Lynch—"Did you tell your employer, Mr. Mellett, the day after you returned—did you tell him what happened?"

Healy K.C. objected.

Mr. Lynch—"It will turn on his cross-examination."

The objection was noted and overruled.

1116. Mr. Lynch—"Were you and your father minding for Mr. Mellett in the month of January, 1908?" "Yes, we worked for him for years."

1118. "Did you, after the visit of yours, that you have sworn

to, to Glanquin—did you some time shortly after that visit inform Mr. Mellett?" "I did, sir." K. B. Div.
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1119. "You swore your visit to Glanquin was on Wednesday night—the night of the day after the funeral?" "Yes." FLANAGAN
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1120. "You seem to be sure of that?" "Yes, sir."

1121. "You were home on the following day—Thursday; will you kindly tell my lord and these gentlemen when you had the conversation with Mellett, your employer?" "On Thursday."

1122. Pim J.:—"That was the following morning when he came home."

1123. Mr. Lynch—"Yes. . . . Did you on the following Thursday morning when you came home tell the same story to Mr. Mellett?"

Healy K.C. objected to the form of the question.

Pim J.:—"Did he inform Mellett what had taken place?"

1124. Mr. Lynch—"Did you on the Thursday when talking to Mr. Mellett tell him what took place at Glanquin the night before?" "I did, sir."

Mr. Patrick Mellett, who was a magistrate for the county, on being called on behalf of the defendants, corroborated Patrick Ryan's story as to Ryan having told him (Mellett) he had been asked to assist the plaintiff, Tim Flanagan, and Tom Flanagan of Glanquin in the forgery of a will of Patrick Flanagan, deceased.

It was now sought to set aside the verdict entered for the defendants, on the ground that Mellett's evidence and Ryan's evidence on re-examination as set out above had been illegally admitted by the judge at the trial.

The counsel and the arguments were the same as those in the Court of Appeal as set out hereafter.

Cur. adv. vult.

MADDEN J.:—

Feb. 27.

My judgment in this case was not written, but delivered from notes, with the assistance of which I am able to furnish to the reporter a short statement of the main grounds of my decision.

I began by noticing that the issue of forgery had been omitted from those presented at the second trial. On inquiring in the office I ascertained that this was accidental, and that the issue of forgery had certainly not been withdrawn.

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I hold that in Ireland as in England the genuineness of an alleged signature is triable under the issue of due execution under the statute, but the practice is different. In England, under Order 19, rule 25A, notice is given of the raising of this defence. In Ireland information is given by a plea.

I went through the facts of the case in some detail, noting particularly the statements of the deceased to the effect that he had not settled his affairs, and intended to die intestate, as proved by Father Vaughan and Michael O'Dwyer, and also the facts relating to what was called Bridgie's Will.

As regards the admissibility of Mellett's evidence, I pointed out that the cross-examination of Ryan was directed to prove hostility between him and the Flanagans, giving rise to the inference that Ryan's story was a perjured invention. I thought the evidence of Mellett was admissible to rebut this inference. I have a full note of what I said on this point.

"In *R. v. Coll* (1), a constable, to whom the prisoner Coll was known, deposed to his presence at the attacks upon District Inspector Martin, for the murder of whom he was tried. In cross-examination, the constable said that he believed that the names of all the persons present at the attack who were known to him were stated in a certain deposition. This deposition did not contain the name of Coll. This, the constable said, was a mistake. The cross-examination was obviously intended to show that the constable's identification of Coll was an afterthought and a perjured invention. To rebut this inference, a still earlier information in which Coll was mentioned as having been present was offered in evidence by the Crown. In this state of facts the conclusion arrived at by the entire bench, as stated by Morris C.J., was that it was 'open to the Attorney-General, acting on behalf of the prosecution, to have offered evidence to rebut the apparent contradiction which had been relied on for the prisoner in the information of the 29th March.' Objection was taken to the particular evidence offered by the Crown on the ground that it amounted to oral evidence of a written document, and it was on this point, which has no reference to the present case, and upon another subordinate question, that there was a difference of opinion between the judges.

The general principle on which all the members of the Court were agreed is clearly stated in Taylor on Evidence (par. 1476). Having referred to some cases, including *R. v. Parker* (1), as authorities for the proposition that evidence is not admissible to show that a witness has on other occasions made statements similar to what he has testified in the case before the Court, the writer adds, "unless, indeed, he has been charged with a design to misrepresent in consequence of his relation to the party or the cause, in which case it will be proper to show that he made a similar statement before that relation existed." I was of opinion that the cross-examination of Ryan brought the case within the principle thus laid down. I was also of opinion that even if Mellett's evidence had been improperly admitted, the verdict should not be disturbed, referring to Order 39, rule 7, as no substantial wrong or miscarriage had been occasioned by the admission. I referred to what was said by Walker L.J., *Tait v. Beggs* (2), at p. 535, and also to *Powell v. Heffernan* (3). I thought that the same verdict would have been returned by reasonable men in the absence of Mellett's evidence, and I stated the grounds of this opinion in some detail.

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KENNY J.:—

Except to the litigants this case, though a very interesting one, seems to me to be unimportant in point of principle. It has been twice tried—in 1910, when the jury disagreed—and again in November, 1916, when the verdict in favour of the defendants and against the alleged will of 1904 set up by the plaintiffs and which is now impeached was arrived at after a six days' trial. The evidence is voluminous and complex, and illustrates in a very striking manner the flagitious and subtle methods capable of being resorted to for the purpose of forgery. I do not propose to restate the circumstances attending the attempted fraud in this case, as they have been so exhaustively dealt with by my brother Madden, and it is quite sufficient for me to say that they in my opinion amply justified the verdict of forgery at which the jury arrived. It is but right to add that I am very sensible of the assistance given to the Court by counsel on both sides in enabling us to disentangle the threads of amazing incidents with which the case is replete.

(1) 3 Douglas, 242. (2) [1905] 2 Ir. R. 525. (3) 8 L. R. Ir. 130.

K. B. Div. Mr. Powell's very compendious and able statement of the facts
1917. and law was extremely helpful.

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Two main affirmative contentions were submitted for our consideration—one by the plaintiff—the other by the defendants. The argument presented by the plaintiff before us is this. A man named Ryan was the chief witness for the defence and deposed to circumstances which, if founded in fact, substantially established that the parties supporting the will in question—a will purporting to be executed in 1904—and who on their own case were the framers of it, were found engaged in the attempted forgery of a second will of the same deceased the day after the latter's funeral in 1908. If Ryan's evidence were true it was in my opinion sufficient, coupled with the other evidence in the case, to condemn as a forgery the will of 1904. Ryan was not a very reputable person, and corroboration of his narrative was offered by showing that he told the same story to a Mr. Mellett immediately after the attempted forgery of a second will. The admission of this evidence of corroboration is challenged as improper, as being calculated to influence the jury, and as being sufficient to invalidate the verdict.

The defendants' affirmative proposition is that, apart from this alleged inadmissible evidence of corroboration, there was sufficient other evidence in the case to support the verdict, and that no substantial wrong or miscarriage within the terms of Order 39, rule 7, was occasioned by the admission of such evidence.

On the important matter of corroboration it was said that the defendants at the trial relied on the specific authority of the case of *R. v. Coll* (1) for the admission of the evidence of corroboration. Mr. Powell repudiates this assertion, and claims that the sanction for such evidence is not founded on a mere decision of yesterday, but is one resting on ancient authorities. The general law as to corroboration was not questioned in *Coll's Case* (1). As a general rule a witness cannot be allowed to give confirmation of his statements by showing that on a previous occasion he made statements similar to his present evidence. We have been referred to such authorities as *Lutterell v. Reynell* (2) and *R. v. Parker* (3) as

(1) 24 L. R. Ir. 222.

(2) 1 Mod. 283.

(3) 3 Douglas, 242.

throwing a doubt on the admissibility of such evidence to corroborate statements that have been impeached. There can, however, be no doubt that there are exceptions to the general rule, and in such authoritative text-books on evidence as Taylor, Phillips, Phipson, and Roscoe such exceptions are expressly recognized, and it is contended that where a design to misrepresent from some motive of interest or friendship is imputed, it may be proper to show that the witness made similar statements when the supposed motive either did not exist, or would have prompted him to make a different statement. But in my opinion the allowance of such evidence is not confined to cases of alleged misrepresentation arising from motives of interest or friendship. In *Coll's Case* (1), though the Court of nine judges was divided as to the admission of the particular corroborative evidence, no doubt was expressed as to the admissibility of corroborative evidence when the statement of a witness is impeached on the ground that it is a fabrication or an afterthought. That was a case in which a constable who gave evidence of identification of the accused was confronted with a previous statement made by him negating identification, and the suggestion was made that his later evidence was an invention. I refer to some of the judgments. Andrews J., one of those who dissented, says that he takes it to be now settled law that as a general rule, upon examination in chief, a witness cannot be allowed to state by way of corroboration that he gave the same account upon a previous occasion, but that when the cross-examination was capable of being used for the purpose of impeaching this direct evidence, "it became legitimate, upon re-examination, to show that the impeachment was not well founded." The Chief Baron, who also dissented, is to the same effect where, at the outset of his judgment, in dealing with the true meaning of the question in the case reserved, namely, whether evidence of the constable's statement of the 14th February was legally admissible, he says: "If its true meaning be the first—*any* evidence—then the question should be answered in the affirmative." The Chief Justice is equally clear as to its being open to the Attorney-General, nay, that it was his bounden duty, to show, if the fact was so, that the impeached constable had mentioned the prisoner on a previous

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occasion as one of those whom he purported to identify. Holmes J., at p. 541, endeavours to show the principle on which the admission of such evidence rests when he says that, "It seems to me that this branch of the law of evidence depends upon the principle which is applied every day in practice, that a witness has a right to explain a matter relied on in cross-examination for the purpose of discrediting him, provided it is really capable of explanation." I therefore take it that there can be little doubt that when a design to misrepresent or to fabricate is imputed to a witness on cross-examination, evidence may be given of previous statements made by him to the same effect as these now made, in circumstances that would not cast doubt upon his truthfulness. In *Coll's Case* (1), it is right to observe that the four dissenting judges put their rejection of the corroborative evidence of the constable upon grounds not in any way opposed to the principle of the admission of corroborative evidence, and all were of opinion that the sworn information of the constable, as distinguished from his answer to the question which was the subject-matter of the case, should have been admitted.

It was, however, contended that there was no such imputation of afterthought or fabrication as would justify evidence in corroboration. But how does the case stand? The plaintiff was examined, and also his brother Patrick, the amanuensis of the impeached will, and by anticipation they attempted to demolish the story which Ryan subsequently deposed to and to question the evidence he might give in many, if not all, of its essential particulars, so that when he came to unfold his narrative, he did so as a witness to whom already possible perjury had been imputed. The facts detailed in his evidence were known only to himself and the plaintiff and the members of plaintiff's family, who were present on the occasion of Ryan's visit in connexion with the alleged second attempt at forgery of a will. In such circumstances, corroboration, if possible and admissible, was vital to the defendant's case. Admittedly, there was no motive of interest or friendship attributed to Ryan, nor inconsistency in statements; but perjury of a gross character was imputed to him, and, in my opinion, justified the reception of the corroborative evidence honestly given by

Mr. Mellett, and it is not unimportant to remember that the admission of such evidence on the former trial had the approval of a very careful and experienced judge, Gibson J., who presided.

With reference to the other evidence in the case I am of opinion that, putting the corroborative proof aside altogether, it was ample to justify the verdict. No doubt the corroborative proof must have strengthened Ryan's position; but the jury had other, and perhaps stronger, materials on which to found their conclusion. The deceased, on his death-bed, when pressed to make a will, had stated that he had not his affairs settled. The plaintiff and his brothers and his mother and sister all lived together, and there was no evidence that the plaintiff or his brother Pat, the alleged amanuensis, ever disclosed to anyone from 1904 to 1908 the existence of the document of 1904, not even to their brother Tom, the sole beneficiary under it. Witnesses were examined at the first trial who, though still in existence, were not produced at the second. Tom was alleged by Ryan to have been present at the second attempt at forgery; yet he was not produced to contradict Ryan's story. There was the inevitable cloud of suspicion and doubt when a testator who is apparently a good man of business and a good penman and in constant communication with his solicitor employs an amanuensis and dictates a will in the extraordinary circumstances relied on by the plaintiff. Suspicion also attached to the action of Tom Flanagan in applying to the Petty Sessions clerk immediately after the funeral for the exact dates of the incarceration in jail of the deceased in the period preceding the manufacture of the impeached will. It was for the jury to say how much credit they attached to Ryan's evidence, and the facts that he had been fired at and wounded after the first trial and that the plaintiff was arrested in connexion with the outrage may not have been regarded by them as unimportant. Finally, the jury had the extraordinary letter written by Tom to his cousin Bridget Flanagan, dated the 26th January, 1908, just one week after the death of the deceased, in which he refers to a third attempt to make a will for the old man, and in which the significant passage occurs, "that copy is now burned, and it is not I who signed your

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uncle's name but John." With these facts before their minds the jury would, in my judgment, have been quite warranted in thinking that, corroboration or no corroboration, this document was a palpable forgery. It is impossible to say with certainty what the jury would have done, and we are not at liberty merely to guess or speculate on what their action would have been. Our opinion must, as is stated by Walker L.J. in *Tait v. Beggs* (1), be the result of judicial inference. The Court has in many cases to put itself in the position of a jury and to ask what conclusion twelve sensible men ought to arrive at in the circumstances. Such cases as that of the *Metropolitan Railway v. Wright* (2), where that question had to be answered, afford an illustration of the Court's endeavour to enter into the minds of a jury. The evidence, beyond and in addition to that of corroboration, in this case was, in my judgment, overpowering, and I feel no difficulty in saying, as a matter of judicial inference, that it was sufficient to justify a verdict of forgery, and that no substantial wrong or miscarriage within the terms of Order 39, rule 7, has been occasioned.

In conclusion, I desire to add that I fail to see that there was any such surprise at the trial as is contended for by the plaintiff. The first trial was fought on the issue of forgery. So was the second trial, and I consider that that issue was fully raised by the plea of non-execution in accordance with statutory requirements.

Dodd J.:—

The first ground upon which the verdict and judgment is challenged is a pleading point. Redundancy in pleading was a fault in common law pleading as it existed in this country before the Judicature Act. In the Probate Court it was a merit. The law casts upon the persons propounding a will the duty of proving that the document was signed by the testator, with certain formalities required by law. Counsel advising proofs, in the ordinary course of practice, would not anticipate that the genuine-

(1) [1905] 2 I. R. 535.

(2) 11 A. C. 152.

ness of the signature was in question. If, therefore, the signature of the testator or the signature of a witness were challenged, the Court insisted that special notice should be given of this, and that it should be so given in the pleading. So far as I can trace, this was regulated by additional forms, settled by Judge Keating about 1865. The plea did not in form say that the signature was a forgery. It took one matter out of many put on proof by a plea traversing the due execution, and said the will was not signed by the alleged testator. This gave prominence to one out of many things to be proved before the document could be admitted to probate.

When the issues settled by the judge to whom probate matters are now assigned come to be tried before a judge sitting at Nisi Prius, he may take one of two courses. He may, if the case turns entirely upon the genuineness of the signature of the testator, as in this case it did, take out the single issue, "Did the testator sign the document?" or he may say, "It lies upon the plaintiff propounding a will to satisfy you that the deceased signed it; you cannot find the issue founded on the due execution of the will unless you are satisfied that the signature is the genuine signature of the deceased. If you are satisfied that he signed it, then there is no controversy as to the other formalities having been duly observed, and you will find the other issues accordingly." I generally adopt the first course. The judge in this case adopted the second course. It is quite the same thing. In no case does a judge think of framing the issue in the form Mr. Comyn contends for—"Was the signature a forgery?" At any rate, he cannot be compelled to put it in that form. Mr. Comyn with engaging frankness says that that form would have given him a better chance with the jury. They conceivably might shrink from finding the positive—that forgery had been committed; whereas they might not shrink from finding the negative—that the will was not duly executed. But that contention is almost whimsical in its absurdity. The whole case turned upon that one issue. There was no surprise. Genuine signatures were produced and proved; an expert was in attendance, though Mr. Healy took credit for not calling him. Some of the senior judges when I became a judge advised me that it was expedient in a case even of an abortive trial to instruct

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K. B. Div. the associate to enter up a certificate. It might be of service to
 1917. know the forms of the questions. When I had written so far it
 FLANAGAN occurred to me to send to the associate's office for the certificate of
 v. Mr. Justice Gibson on the first trial. I find he put one question
 FAHY. only: "Did Patrick Flanagan sign the document of July 14th,
 Dodd J. 1904?" No other issue was sent up. But this is not in the form
 Mr. Comyn now contends for. I am of opinion, therefore, that on
 this first ground of challenge, which occupies the entire almost of
 the notice of motion, the contention fails. There is no other mis-
 direction specially mentioned in the notice; but a second ground
 has been put forward and argued, and argued rightly, as arising
 on the notes of the judge.

This second ground is as follows:—"The witness Ryan was asked if he had told the story he told in the box to Mr. Mellett, and Mr. Mellett was called to prove that the witness had told him. A decision of Mr. Justice Hawkins, *Beatty v. Cullingworth* (1), was opened by Mr. Healy and urged by Mr. Comyn as governing the decision in this case; but that decision was upon an entirely different controversy. In criminal charges for offences against women and girls it had been the practice, as part of the examination in chief of a witness for the Crown, to ask if immediately after the occurrence she had made a complaint. Some judges allowed the question, "Did she make a charge?" and stopped there. Other judges allowed the terms of the complaint to be given. In *The Queen v. Lillyman* (2) the Court held that the full statement made might be given in evidence as negating consent; and they applied it to cases where consent was not essential, upon the ground that the girl's conduct was "consistent throughout." Hawkins J. was asked to apply that to an action for assault, where the defence was consent. The witness was asked, as part of her examination in chief, whether she had told some one. The judge, of course, disallowed the question. The problem to what extent the principle now applies—whether it extends to statements made by boys, and whether such statements should be admitted as evidence of corroboration under Stead's Act—has given rise to some not quite consistent decisions. But Mr. Powell and Mr. Lynch did

(1) 60 J. P. 740.

(2) [1896] 2 Q. B. 167, C. C. R.

not tender the evidence on any such ground. They admitted that evidence in chief could not be given, and they did not seek to give it. The case is, therefore, not in point.

The right to tender the evidence and the right of the judge to accept it in this case depend solely on the cross-examination, and this makes the matter one of considerable difficulty. The proposition laid down in *Taylor*, 10th ed., par. 1474, and accepted and incorporated as good law by the Court of Criminal Appeal in England in *Arthur Benjamin's Case* (1), is quite explicit. The difficulty is in applying it.

Mr. Healy in the course of the argument made an allusion to the struggle between advocates in Court as a game. He complained that something said or done was "not cricket," "was not playing the game." There is this foundation for the remark. The object of our jurisprudence is not to get at the truth and fact in each case; it is to get at the truth and fact in accordance with settled rules regulating evidence—rules that may seem artificial, and in some instances are illogical, but are binding upon the Court. I think it is more dignified and more illuminative to take the analogy of a struggle of war, in which each contestant relies not merely on the troops he can bring into the field, but also on the strategy with which they are handled. The objective of the counsel for the plaintiff was to establish the document propounded as the genuine will of Patrick Flanagan, signed by him in his lifetime, and duly executed in the presence of two witnesses. The objective of the defendant was to establish that the document was fabricated after the man's death. The generals were peculiarly well fitted for the contest, and the case was one in which strategy was a dominating factor in the result. Counsel for the defendant sought to break down the witnesses for the will, not by matters going to their general character for veracity. They said the story they told was in its facts contrary to common experience and observation, and that the integrity and veracity of the witnesses were not so indisputable as to induce the jury to believe the story.

They made a counter-attack. They brought a great many facts to light, which tended to show manipulation, contrivance,

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K. B. Div. fraud, and forgery after the death. And they called a witness
 1917. named Patrick Ryan to prove that the will was in fact fabricated
 FLANAGAN after the man's death. It is not necessary for me to repeat the
 v. story in all its details—a story so graphically told already. It
 FAHY. is enough to say that Ryan testified to an occurrence that took
 Dodd J. place on the Wednesday, when Tim and Tom and Pat Flanagan,
 junior, aided, or to be aided, by Gilligan and Curtis, the so-called
 witnesses to the alleged will, were all engaged in fabricating the
 document now propounded as the last will of Pat Flanagan.

I have said the counsel were specially qualified. Mr. Healy, who now led for the plaintiff, had been chief of staff to The MacDermot in the great battle at Maryborough and the final struggle in the Court for Crown Cases Reserved: *R. v. Coll* (1). Mr. Comyn had the benefit of his knowledge and experience, and had a reserve of experience of his own. The first trial had been before Mr. Justice Gibson, the judge who reserved the case in *R. v. Coll* (1), and was one of the judges who adjudicated upon it, and presumably the matters of law now raised, if raised before him, were dealt with. Mr. Powell and Mr. Lynch were adepts in all matters affecting the law of evidence. All knew the rule of law that Ryan could not be asked any question on the direct as to when and why he first mentioned his story to anyone, and Mr. Lynch, who examined him, was too astute a leader to ask any such question. He sat down therefore, having proved in more detail the matters I have briefly indicated, without asking any such question. What were counsel for the plaintiffs to do? It is conceivable that they might have let the witness go. He had admitted that he was at one time willing to take part in the fabrication, and that, for a time at any rate, he accepted some sheep as a bribe for holding his tongue. It is conceivable, but such a course could not have led to victory. The next course was to pretend to cross-examine, to test the credibility of the witness generally while refraining from touching upon the relations between the witness and the plaintiff Tim and his brother Tom. Mr. Comyn, with marvellous restraint, tried this course, and very nearly succeeded. The cross-examination of

this witness is characterized by masterly restraint. But it was practically impossible. He could not succeed. The jury would wish to know when Ryan invented the story, and why. If there had been bad feeling between him and the brothers beforehand, it would not only have discredited his story, on the improbability of one in such a position of antagonism being called upon to assist in such a transaction, but would have disclosed a motive. The most natural question would be—"When did you invent this story, Ryan?" "Were you on bad terms with the Flanagans?" "When first did you tell any human being this marvellous tale?" If he had asked any such question, he would have at once left an opening for the reserves to enter. But these were questions to which an answer must somehow or other be given to the jury; unless some explanation were given, the matter would be at large. After some questions going to the general credit of Ryan, he interrogated as to two assaults by the witness on Tim Flanagan. These were in February or March, 1909, more than a year after the date of the transaction. Mr. Comyn took credit to himself for not bringing out the fact that Tim had seduced Ryan's sister. What impression it left on the jury, we may only arrive at by reasonable inference. The impression it left on the judge is manifested by his question as to how long friendly relations existed between the witness and Tom. The reply was a year and a half; that is, up to the outrage on the sister of the witness. The question for our consideration is, whether looking at the entire cross-examination, we should not interpret it as if a direct question had been put charging him with an invention of the story from malice, hatred, and ill-will to the Flanagans. There can be no difference in principle whether the imputation is made by one straight question or by skilful inuendoes of interrogation if the same meaning is conveyed. What, then, did the cross-examination mean? How would it reasonably be understood?

Mr. Lynch promptly took up the ground so opened up, asking the witness whether he had not told the same story to Mr. Mellett the next day. The witness said he had. Mr. Mellett was called and gave a like answer. There was some hesitancy as to the time on Mr. Mellett's part; but as the result of my consideration of all his evidence, I am satisfied that he was told almost immediately

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K. B. Div. after the Wednesday, and, as I think, on the Thursday. The
 1917. sheep were not taken, or rather were not kept, and it appeared
 FLANAGAN incidentally that Mr. Mellett was satisfied to accept Ryan's evidence
 v. of the date as being right. He believed Ryan, he said. This was
 FAHY. on cross-examination. One other matter I may mention in this
 Dodd J. connexion. The names given by Ryan were the actual names
 appearing on the document, and the will was to the effect indicated by him. No question was asked as to how, assuming his story to be fabricated, he could have ascertained these details. Mr. Comyn suggests he could have heard them in Court at the first trial. But the lists were then set. Ryan and the expert were both in attendance, and his suggestion does not commend itself as probable, especially as it is the suggestion of counsel, unsupported by any cross-examination or affirmative evidence.

There is only one more point that was presented, though not very strenuously. It was that *Coll's Case* (1) and the others only permitted the witness to be asked whether he made the statement, and to whom, and that the person to whom he made it could not be called; that would be to leave him still unproved. If he was lying in other matters, he would lie in this.

The reasoning of all the judges in *Coll's Case* (1) would go to show that a parol statement could be proved. If so it could be best proved by the person to whom it was made. Mr. Justice Gibson makes this part of his judgment. He says (p. 530):—"It would seem that previous statements of the witness incriminating Coll, whether oral or written, proved by himself or others, would be legitimate evidence, not, of course, as substantive proof of the matters stated, but to repel the imputation made by the question."

My opinion being that the evidence was rightly admitted, the third matter argued, that, notwithstanding the reception of such evidence, the Court should still refuse a new trial under Order 39, rule 7, does not call for consideration. I wish, however, to point out an inaccuracy in the head-note to *Powell v. Heffernan* (2). The Chief Baron did not lay down the proposition that a new trial will be refused only where a different result of the trial would be set aside as perverse. What he did say was that in

that case, "even without the evidence the jury could not in reason have found otherwise than for the plaintiff," a different proposition (1). Each case must be determined upon its own facts, without introducing any supposed hard and fast principle not contained in the rule.

Even if the evidence were wrongly received, I would be quite prepared, on all the facts and the documents, including John's letter to Bridgie, to uphold the verdict. The alleged will was an impudent forgery, to use words applied by Macaulay to Macpherson's production of "Ossian."

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The plaintiff appealed (2).

Oct. 31.
Nov. 1, 2, 5,
6, 19.

Healy K.C. and *Carrigan K.C.* (with them *Comyn K.C.* and *Phelps*), for the appellant:—

We allege misdirection, and maintain that we are entitled to use a shorthand note of the judge's charge to the jury. Mr. Justice Pim, in a communication to the King's Bench Division, declined to adopt the note; and the Court then refused to allow it to be used. The question whether a litigant is entitled to make use of a shorthand note of a judge's charge is one of the highest constitutional importance. In England the costs of the shorthand writer's notes of the evidence taken at the trial of an action before a judge and jury will not be allowed, but only of the judge's summing up: *Pilling v. Joint-Stock Institute* (3). [They referred also to *Blue & Deschamps v. Red Mountain Railway* (4) and *Fawcett v. Townsend* (5).]

On the main branch of the case the question is, whether when a witness is shown to be of bad character and his testimony has been challenged another witness can be called to prove that the

(1) 8 L. R. Ir., at p. 145.

(3) 73 L. T. R. 570.

(2) In the Court of Appeal before

(4) [1909] A. C. 361.

SIR IGNATIUS J. O'BRIEN C., and

(5) 10 Ir. Jur. (N. S.) 117.

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impeached witness had years before told him the same story. It was to corroborate Ryan's evidence that the defendants called Mellett. *The Queen v. Coll* (1), upon which they relied, does not touch this case. What was in question there was the identification of a particular person, and it arose out of the cross-examination. Nothing occurred in the cross-examination in the present case to let in the evidence of Mellett. In *The Queen v. Coll* (1), at p. 541, Holmes J. said:—"It is, I think, clear that the evidence of a witness cannot be corroborated by proving statements to the same effect previously made by him; nor will the fact that his testimony is impeached in cross-examination render such evidence admissible."

Evidence that a witness has on other occasions made statements similar to what he has testified in the cause is not admissible, unless, indeed, he has been charged with a design to misrepresent in consequence of his relation to the party or to the cause, in which case it will be proper to show that he made a similar statement before that relation existed.—Taylor's Law of Evidence, 10th edition, vol. ii, p. 1071. The situation dealt with in the above statement did not exist in this case. Apart from the evidence which, we say, was illegally admitted, there was not sufficient evidence to support the verdict of the jury. [They cited:—*The King v. Parker* (2); *Rex v. Cargill* (3); *Powell v. Heffernan* (4); *Arthur Benjamin* (5); *Tait v. Beggs* (6); *Sandford v. Porter & Waine* (7); *Anthony v. Halstead* (8); *Jones v. Spencer* (9); *White v. Barnes* (10).]

[Ronan L.J. refers to *Doe, d., Teynham v. Tyler* (11); *De Rutzen v. Farr* (12); *Wright v. Doe, d., Tatham* (13); *Hodson v. Midland Great Western Railway Company* (14); *Bray v. Ford* (15).]

(1) 24 L. R. Ir. 522.

(2) 3 Douglas, 242.

(3) [1913] 2 K. B. 271.

(4) 8 L. R. Ir. 130.

(5) 8 Cr. App. Cases, 146.

(6) [1905] 2 I. R. 525, 530.

(7) [1912] 2 I. R. 551, 564.

(8) 37 L. T. R. 433.

(9) 77 L. T. R. 536.

(10) [1914] W. N. 74.

(11) 6 Bing. 561.

(12) 4 Ad. & E. 53.

(13) 7 A. & E. 313.

(14) I. R., 11 C. L. 109.

(15) [1896] A. C. 44.

Powell K.C. and *Lynch K.C.* (with them *G. Cullinan*), for the respondents :—

The questions put to Ryan on re-examination were admissible, and counsel for the defendants were entitled to examine Mellett. Even if the evidence in question was improperly admitted, there was, altogether apart from it, an overwhelming case against the will, and a verdict the other way would have been a miscarriage of justice. [They relied on *The Queen v. Coll* (1); *Floyd v. Gibson* (2); Taylor on Evidence, vol. ii, 10th ed., pp. 1071-72.]

Healy, in reply.

Cur. adv. vult.

SIR IGNATIUS J. O'BRIEN C., having analyzed the evidence and shown that it supported the verdict of the jury, next dealt with the question of the admissibility of the evidence of Ryan as to the alleged conversation with Mellett, and the admissibility of the latter's evidence relating what he had been told by Ryan; and proceeded :—

The following questions were put by Mr. Comyn :—"Tell me, Were you, on the 1st March, 1906, summoned to the Petty Sessions in Corofin for unlawfully presenting a revolver at the testator, and threatening to blow his brains out—was that complaint made against you? It was made against me; but it was false. Did you settle the case? He settled it himself. Were you summoned also on the 22nd of March, 1909, for assault on Thomas Flanagan—were you? I might have been, he having blackguarded me greatly. Were you convicted? I would not say I was convicted. Were you convicted on the evidence, and ordered to pay 5s., and for costs the sum of 1s.? I was, when he blackguarded a sister of mine, when I met him on the public road. Were you again convicted for having, on the 22nd March, 1909, assaulted Tim Flanagan? It is likely I did. I asked him would he not marry my sister."

Taking the cross-examination on the whole, there can be on the face of it no other construction except this: that because Tom Flanagan had blackguarded Ryan in 1909, and Tim had

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wronged his sister—a child having been born—his testimony must be false, being invented from malice; that he had told a concocted story from enmity to the Flanagan family.

Mr. Lynch and Mr. Powell were confronted with the position that, having an overwhelming case against the will, they had put forward a witness who, the jury might think, had invented a story out of malice on account of the outrage committed against his sister, and who, they might believe, had told a different story to other men. What were counsel to do? They knew that in such circumstances there was a rule of law which enabled them to prove that the statement which was made in the witness-box was made at a period anterior to the time at which it was alleged the story was invented. Such proof is not corroboration. It rests upon a different principle altogether. Accordingly, Mr. Lynch asked: "Did you tell your employer, Mr. Mellett, the day after you returned—did you tell him what happened?" Mr. Healy objected. Mr. Lynch: "It will turn on his cross-examination." Objection noted and overruled. Subsequently Mr. Lynch put the question: "Did you on the Thursday, when talking to Mr. Mellett, tell him what took place at Glanquin the night before?" The answer of the witness was: "I did, sir."

One of the points we have to decide is whether this was a legitimate question. Mr. Mellett was examined, and in substance proved that Ryan told him some days after the death of Pat Flanagan—that is more than a year before the "blackguarding" incidents—the same story that he had told in the box. All this evidence was objected to; but, as I have already said, there was, apart from it, evidence of an overwhelming character to justify the conclusion of the jury. It has, however, been argued, even admitting this, that on account of the character of the re-examination of Ryan, and the admission of Mr. Mellett's evidence, a new trial ought to be granted. That turns upon the construction which must be given to the law regulating new trial motions; but, first, we have also to consider the question whether the whole of that evidence was not rightly admitted. If it was there is, of course, an end to the case, but I find it impossible to avoid deciding the two points—firstly, whether the evidence

was properly admitted; and, secondly, whether if not properly admitted we are bound to grant a new trial.

Mr. Healy has appealed, not only on the ground that the evidence was not admissible, but also on the ground that even if it was there should be a new trial. He also contends that we are bound to look at the transcript of a shorthand writer's notes of the judge's charge to the jury, which he alleges shows misdirection and other errors, which would coerce us to grant a new trial. He describes the document he asks us to admit as an official document. There is no official document. A shorthand writer is engaged to take a note of the evidence in probate actions, and, to a certain extent, the transcript of that note is official; but an official transcript of the judge's charge has no legal existence in this country. A judge may direct a shorthand writer to take a note of his charge, and he may adopt the transcript; but there is no regulation compelling him to do so or compelling us to look at it if the judge refuses to adopt it. According to the practice and the law in this country unless the judge incorporates a document in his report we cannot look at it. In England the practice, it is suggested, is somewhat different. In a communication to the Court below the learned judge declined to adopt the shorthand writer's transcript as authentic or representing what he said to the jury; and, quite apart from the practice, it would be a very extraordinary thing if a note, which may be that of an inefficient shorthand writer, were to be accepted to contradict what the judge states he said. It would, I conceive, be a new practice. I decline to adopt it.

I come now to the admissibility of the evidence of Ryan's statement to Mellett. Notwithstanding the powerful addresses made to us as to the appalling result that might follow if this evidence was held to be admissible, I am satisfied that its admission was founded on elementary law and justice. This evidence was not tendered as corroboration. A man cannot corroborate himself by making even one hundred statements in addition to the one he makes in the box. Although our practice has changed, it is based on very old principles. In Phipson on Evidence, 4th edition, at pp. 471-2, I find the following useful summary of the law:—
"Formerly the fact that a witness had made a previous statement

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Appeal. similar to his testimony in Court could always be proved to
 1917. confirm his testimony: *Luttrell v. Reynell* (1); *Friend's Case* (2).
 FLANAGAN But afterwards the rule was changed, and such evidence is now
 v. generally inadmissible either on direct examination to confirm his
 FARR. testimony, or on re-examination to re-establish his credit when
 Sir Ignatius J. impeached by proof of a previous contradictory statement." Then
 O'Brien C. follows under the head of exceptions:—"Such statements are re-
 ceivable in the cases mentioned below, not to prove the truth of
 the facts asserted, but merely to show that the witness is consistent
 with himself"; and the first class of cases mentioned is "where the
 witness is charged with having recently fabricated the story,
e.g., from some motive of interest or friendship, it may be shown
 that he made a similar statement before such motive existed";
 and one of the authorities given in support of the proposition is
R. v. Coll (3). In *Taylor on Evidence*, 10th ed., pp. 1070 and 1071,
 the point is dealt with thus:—"Where evidence of contradictory
 statements, or of other improper conduct on his part, has been
 either elicited from a witness on cross-examination, or obtained
 from other witnesses, with the view of impeaching his veracity—
 his *general character* for truth being thus in some sort *put in*
issue—general evidence that he is a man of strict integrity and
 scrupulous regard for truth will be admitted. But evidence that
 he has on other occasions made statements similar to what he has
 testified in the cause is not admissible, unless, indeed, he has been
 charged with a design to misrepresent, in consequence of his
 relation to the party or to the cause, in which case it will be
 proper to show that he made a similar statement before that
 relation existed." *The Queen v. Coll* (3) did not lay down any
 new law whatever. So far as its main features are concerned, it
 was merely the application of a well-settled principle, recognized
 for years, with regard to the admission of evidence. It is a very
 valuable case, because the judgments in it cover this branch of
 law fully; and in another respect it is valuable by reason of the
 fact that parol evidence of a fact to be found in a document in
 existence was admitted, so that to that extent it may be regarded
 as an extension of the law; but with regard to the principle that

(1) 1 Mod. 282, 283.

(2) 13 How. St. Tr. 31-32.

(3) 24 L. R. Ir. 522.

the original statement in an information consistent with the witness's evidence was admissible, the judgment of the Court was clear. Gibson J., in his judgment, at pp. 529-30, says:—"The first question seems to me to depend entirely upon the effect and meaning of the cross-examination. Any difficulty there may be in the case lies, not so much in ascertaining the legal principle which should govern, as in the application of that principle to the facts—a matter in which little, if any, assistance is to be derived from reported cases. As a general rule, neither upon direct examination nor re-examination is evidence of previous statements made by a witness admissible to confirm or set up the credit of such witness. Under special circumstances evidence of such previous statements may be given. I do not venture to attempt a definition of the conditions necessary to justify the reception of such evidence—a difficult, perhaps impossible, task. Dealing with the particular case before us, I think the principle upon which the admission of Varilly's antecedent statement should be rested—if it be admissible—is, that the cross-examination, in order to destroy Varilly's credit, was directed to suggest that his evidence at the trial was an invention of late date. Had counsel asked, 'Did you, Varilly, ever, before the 29th March, say that Coll was present, or make any charge against him in connexion with the murder?' it would seem that previous statements of the witness inculpating Coll, whether oral or written, proved by himself or others, would be legitimate evidence—not, of course, as substantive proof of the matters stated, but to repel the imputation made by the question. In the present case (which is novel in instance though not in principle) there was no direct question of such a character as I have mentioned. The cross-examination was (it is said—probably truly said) capable of a double interpretation; and the point for our consideration is whether, looking at the entire cross-examination, we should interpret it as conveying the same imputation as if a direct question had been put charging him in terms with recent invention of his story. There can be no difference in principle, whether the imputation is made by one straight question or by skilful circuitry of interrogation, if the same meaning is conveyed. What, then, did the cross-examination mean?" The object of the cross-examination in the present case

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Appeal. was, as I have already stated, to show that Ryan was not only a
 1917. perjurer, but that he had invented the story at a date later than
 FLANAGAN the occurrence, because of enmity to the plaintiff's branch of the
 v. Flanagan family, and that he had told a different story at a date
 FAHY. anterior to the trial.

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In *Benjamin's Case* (1) a note-book was admitted in evidence to prove that the testimony of a witness at the trial was not an afterthought. The Lord Chief Justice said: "Mr. M'Donald suggested in his speech that the story of the chimney was untrue, and was an afterthought, on the ground that the witness had said nothing about the chimney in his depositions before the magistrate. The note-book showed that Jones mentioned the chimney to his inspector before the proceedings in the police court, and the note-book was produced to verify that fact. Then Mr. M'Donald said that the note-book was a forgery. The book was not put in as evidence, but in order to show that unless a book was a forgery, the story of the chimney was not an afterthought." In that case *The Queen v. Coll* (2) was applied. With regard to the evidence of Mellett there is no reason why he should have told a lie as to what Ryan told him. On the whole, therefore, I am of opinion that this evidence was admissible.

As to the granting of a new trial on the supposition that this evidence was improperly admitted, it is not necessary for me to say more than to state my view in outline. Order 39, rule 7, says: "A new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial." The terms of this rule are absolutely mandatory, and it is the duty of the Court in every case to consider whether by reason of the admission of improper evidence a "substantial wrong or miscarriage" would result. In the case of *Tait v. Beggs* (3) this Court refused to grant a new trial although evidence was improperly admitted, and although all the members of the Court thought that its admission might possibly have affected the amount

(1) 8 Cr. App. Cas. 146.

(2) 24 L. R. Ir. 522.

(3) [1905] 2 I. R. 525, 530.

of damages. In that case *Bray v. Ford* (1) was strongly relied upon in support of a new trial. In *Bray v. Ford* (1) there was a misdirection which went to the root of the case; and the House of Lords, reversing the Court of Appeal, ordered a new trial on the ground that the defendant in the action was not permitted to present his real case to the jury, who, in assessing the damages, might have been influenced by the misdirection. It would have been a denial of justice if a new trial had not been granted in that case. In distinguishing the case from *Tait v. Beggs* (2) FitzGibbon L.J. says in his judgment in the latter at page 534: "The judge told the jury that the plaintiff was entitled to charge profit costs, but the House of Lords held that he could not receive them, being himself entrusted with the government of the institution, and the Lords ordered a new trial on the ground of misdirection, and declined to consider what influence the miscarriage might have had upon the amount of damages. Lord Halsbury said that the substantial wrong was that the defendant was not permitted to present his case with the argument that his original complaint was true. But is it possible to say, in the present case, that there has been a substantial wrong or miscarriage in the assessment of damages, or that the admission of the apologies substantially affected the damages? The conduct of Beggs himself in offering the considerable sum of £10 to settle the case, accompanied by the threat that if it was not accepted he would produce evidence either of justification or to depreciate the plaintiff's character, entitled the jury to give substantial damages, especially when he did not present himself as a witness. His wife's apology to the men, when he himself offered no apology to the woman, could not, in my opinion, be held to have the effect of making a verdict for £100 a substantial wrong or miscarriage when, on the uncontradicted evidence of the husband's own conduct towards the plaintiff, I cannot say that the verdict per se is unjustifiable." That is a perfectly clear expression of opinion, because even though the damages might have been affected by the admission of the evidence, still that was not sufficient ground for holding that the verdict per se was unjustifiable, and Lord Halsbury's judgment in *Bray v. Ford* (1) was held to be inapplicable.

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(1) [1896] A. C. 44.

(2) [1905] 2 I. R. 525, 530.

Appeal. Going back to the earlier cases, we find that in *Doe d., Lord*
1917. *Teynham v. Tyler* (1), the rule as to granting a new trial for the
 FLANAGAN reception of illegal evidence was laid down by Tindal C.J., in
 v. FAHY. these terms:—"I will assume for the purpose of this discussion
 Sir Ignatius J. that the evidence in question ought not to have been received.
 O'Brien C. But the Court will not close their eyes to the rest of the evidence;
 and if they see that there is enough, not merely to make the scales
 hang even, but greatly to preponderate in favour of the defendant,
 they will not send the case to a jury again. It has been contended
 that we are to analyze the evidence by a difficult process, and to
 discriminate the precise effect produced on the mind of the jury
 by each portion of the proof; but we have a much plainer course,
 and that is to read the report of the trial, and to sustain the
 verdict, if we are satisfied that there is enough to warrant the
 finding of the jury independently of the evidence objected to."
 In connexion with the history of the law on the subject, that was
 a very interesting case. The question at issue involved proof of
 only one of various acts proved by other evidence to the satisfac-
 tion of the jury. Assuming that the particular evidence objected
 to had been improperly admitted, the Court were of opinion that
 the settled practice and rule of law were such that they were not
 bound to send the case to a new trial, there being evidence amply
 sufficient and preponderating to support the conclusion of the jury,
 exclusive of the inadmissible evidence. This view, however, was
 not accepted in subsequent cases, and the opposite view found its
 most extreme application in *Hodson v. Midland Great Western*
Railway Company (2). That case appears to have been the last in
 which there was a consideration of the question whether *Teynham*
v. Tyler (1) laid down the true rule. Baron FitzGerald says:—
 "I agree, however, to the rule where illegal evidence has been
 received after objection, that the verdict cannot be sustained unless
 the Court is satisfied that it did not weigh with the jury, or that
 the verdict, if given the other way, would have been set aside as
 against the weight of evidence." That would appear to me to be
 the extreme statement of the rule as it was supposed to exist
 before the judicature rules, and the object of Order 39, rule 7,
 was, as I conceive, to get rid of the inconvenience produced by

(1) 6 Bing. 561.

(2) I. R. 11 C. L. 109.

the adoption of that view, and to restore substantially the older view taken in *Teynham v. Tyler* (1). If the evidence improperly admitted could not have affected the other evidence one way or the other, then, certainly, if the general rule is to be applicable, a new trial ought not to be granted.

There may be cases where the evidence illegally admitted would, if subtracted or disregarded, leave the matter in such a way that the jury might be warranted in drawing an inference in favour of either side. In addition to the cases where the scales hang evenly, we may have cases where the evidence is so preponderating in favour of one side that the improper acceptance or rejection of a particular piece of evidence would not affect the weight of or alter in any way the conclusion capable of being drawn from the evidence which was lawfully given. Between these two limits there must be an infinite variety of cases in which all one can do is to apply some general working view which will satisfy his own conscience, and at the same time give effect to the rule. The Court must be of opinion, not by guess or speculation, but by judicial inference, that the same verdict would have been returned if the evidence had not been admitted. We must, however, bear in mind that the Court cannot usurp the function of the jury, and we must also be satisfied that the case is not one in which a direction could have been given. As observed by Walker L.J., in *Tait v. Beggs* (2):—"Every case in which the general order is sought to be applied must depend on its own circumstances." In the present case, I am clearly of opinion that twelve reasonable men could not have arrived at any other conclusion than that the will was a forgery, even though the evidence objected to had been eliminated. Rule 7 of Order 39 is, as Holmes L.J. says in *Tait v. Beggs* (2), at p. 538, "a very valuable provision when properly applied, as its object is to prevent one of the greatest hardships in legal proceedings—an unnecessary second trial." I think this is a case in which to apply it.

Bray v. Ford (3) was a clear case one way; this is a clear case the other way. While I abstain from laying down any hard and fast rule, I admit that where elimination of the improperly admitted

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Sir Ignatius J.
O'Brien C.

(1) 6 Bing. 561.

(2) [1905] 2 I. R., at p. 538.

(3) [1896] A. C. 44.

Appeal. evidence, an even balance would result, I should be rather disposed—and I do not think I would be precluded from so doing
 1917. by the general order—to grant a new trial; but where, as here, I
 FLANAGAN v. find, apart from the evidence assailed, an enormous and over-
 FAHY. whelming case in support of the verdict of the jury, I am bound
 Sir Ignatius J. to give effect to the rule by refusing to grant a new trial.
 O'Brien C.

RONAN L.J.:—

I agree with the observations of the Lord Chancellor in relation to the shorthand note of the judge's charge. I also agree with him as to the admissibility of the evidence of Ryan's statement to Mellett, but as this matter was so fully argued before us, I proceed to deal with it in detail.

The entire evidence of Ryan was impeached as being an absolute fabrication and invention. If there was no cross-examination he would have had no opportunity of explaining and showing that it was not. The practice here on the part of skilful counsel has been not to ask any questions which would give the witness an opportunity of explaining, or of stating facts or giving reasons in support of his evidence, unless counsel supposed he could obtain an answer favourable to his case.

The late Mr. M'Donagh was (in the opinion of FitzGibbon L.J. at all events) the most skilful nisi prius advocate of our times. I was once in a case with him. At consultation a discussion arose as to putting certain questions on cross-examination. He said: "I never ask a question on cross-examination if I care one pin which way it is answered." It does not do of course to let the witness go down without cross-examination. In such cases the course taken in practice is well described by Dodd J. with his great experience of nisi prius, viz., "to pretend to cross-examine," there being no real cross-examination. In my opinion there is no difference between an unreal pretended cross-examination, and the total absence of cross-examination. Let us first suppose there was no cross-examination at all. The result here would be that the question 1115 and the whole of Mellett's evidence would be inadmissible. But in England this would not have been the only result. The settled law and practice there is that, if you do not cross-examine a witness, so as to give him an opportunity of

explaining and justifying his evidence or any part thereof, you are taken to have accepted the evidence in respect of which you have not so cross-examined. Mr. Healy, with his extensive English practice, quite agreed as to this. It is stated in the leading text-books, and was dealt with in the House of Lords in the case of *Browne v. Dunn* (1). This difference of practice must be considered in applying the English cases. I say nothing as to how far *Browne v. Dunn* (1) governs the Irish Courts.

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"
FALTY.

Ronan L.J.

Now let us take the actual cross-examination. From 1023 to 1037 the object is to show that Ryan was a violent man, using a revolver, and that he was a drunkard. Questions 1038 to 1041 are as follows [reads]. The questions, and still more the answers, afford evidence of great hostility to Tom and Tim in March, 1909. Was not this the plain object of the questions and the plain result of the answers? Mr. Healy says no; it was only to show that Ryan was a violent man. I cannot accept this view. Drink and violence would be no explanation of or motive for the fabrication of the story. Hostility to Tim and Tom would afford a strong motive. If immediately after 1042 the direct question were put, "Did not these matters induce you to fabricate this story?" it was practically admitted that the evidence would have been admissible. I then put this to Mr. Healy: "If the entire cross-examination had been confined to questions 1038 to 1041, would the omission of this direct question prevent the admissibility of the statement to Mellett?" He said it would. He was driven to this, as it was obvious that if it was admissible in consequence of 1038-1042 there is nothing in the rest to exclude it.

This not a question of an omission from a prior statement, as in *The Queen v. Coll* (2). It is a much wider question, viz., if a witness is charged with having invented and fabricated a story in consequence of a certain transaction, is it not open to him to show that this charge is false by proving that he had told the story long before the transaction in question? Surely there can be no doubt that in any rational system of law he must be allowed to do so.

As to the omission of the direct question, I respectfully adopt the following weighty passage from the judgment of Gibson J. in

(1) 6 Rep. 67.

(2) 24 L. R. Ir. 522.

Appeal. *The Queen v. Coll* (1). [Reads from judgment, at p. 532.] It seems to me, in the present case, the direct question was quite unnecessary. It was implied in the questions asked. However, the present case goes farther as to the omission. The evidence now objected to was admitted by Gibson J. on the former trial. On this Mr. Healy very properly said that we had not the cross-examination in that case before us; but he added, "Mr. Comyn was most careful in his cross-examination not to ask any question which would let the statement in."

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Roman L.J.

The object of the omission to ask the direct question was, therefore, that the case should go to the jury with proof of strong hostility on the part of Ryan to Tim and Tom as a motive for the fabrication of the story, and at the same time that Ryan should be precluded from showing that he had told the story long before the occurrence which gave rise to this hostility.

I do not agree with Dodd J. that this was a pretended cross-examination. I think questions 1038 to 1041 were a real cross-examination, to the effect that Ryan fabricated this story in consequence of the transaction of 1909, and that the omission to ask the direct question was a mere pretence that the cross-examination was not what it really was. I think that this pretence has wholly failed, and that is, I think, what Dodd J. really meant.

If I am right in this view, evidence of the statement to Mellett was admissible. If it was, the admissibility of the information in *The Queen v. Coll* (1), which was decided by all the members of the Court, seems a clear authority for admitting evidence of the statement other than that of the witness who has been cross-examined. I have known evidence of this class to have been admitted on several occasions by eminent judges. The only one I can specifically mention was the prosecution during which the Cork courthouse was burned. In that case a police sergeant was allowed to prove that the witness had made the antecedent statement to him, and that he had taken it down, and he then produced the writing. The case in the Court of Criminal Appeal, *Arthur Benjamin* (2), referred to by the Lord Chancellor, is similar to this.

MOLONY L.J. :—

The plaintiff in this case sought to establish an alleged will of Patrick Flanagan, dated the 14th day of July, 1904, and the defendants, who are the next-of-kin of the deceased, in addition to the usual pleas, asserted that the paper writing alleged by the plaintiff to be the last will and testament of the said deceased was not signed by the said deceased, or by any other person in his presence, or by his direction.

The case went to the jury on the issue as to whether the alleged will was executed pursuant to the provisions of the statute 1 Vict. c. 26, and the jury found that it was not so executed, and, accordingly, the alleged will was condemned.

The plaintiff instituted a motion for a new trial mainly on the ground of the improper admission of evidence. Another ground, founded on the form in which the question was left to the jury, was relied on in the Court below, but was not argued here. The King's Bench Division refused the motion for a new trial, and from their order this appeal has been brought.

The question which is raised in the case is one of considerable importance. The plaintiff, having produced evidence in support of the will, including the witnesses to it, Patrick Ryan was examined on behalf of the defendants, and he gave a full and circumstantial account as to how the will was written by Pat Flanagan, junior, after the death of the deceased, and that he had been invited to put his name to it as a witness, and that he was given, or told to mark for himself, seven or eight sheep as a bribe, and on the understanding that he would never speak about the matter of the will. If this witness was to be believed, a very strong case was made against the will, and, consequently, he was severely cross-examined, both as to the circumstances connected with the making of the will, and as to his own character. He was asked whether he had been summoned for assaulting Thomas Flanagan, the beneficiary under the will, and he said he might have been, "he having blackguarded me greatly." He was then asked in reference to a conviction for assault, and he said he was convicted of an assault on Flanagan when he met him on the public road, after he had blackguarded the witness's sister. He also admitted that he was convicted on a

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Appeal. subsequent occasion when he asked Flanagan would he not marry
 1917. the girl.

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 Molony L.J.

The suggestion in the cross-examination clearly was that the witness had invented the story about the will in consequence of ill-feeling towards Thomas Flanagan due to the allegation that there had been misconduct between Ryan's sister and Thomas Flanagan. Undoubtedly there was bad feeling at that time between Thomas Flanagan and Ryan, and it was desirable for the plaintiff to show, if he could, that long before there was any such bad feeling Ryan had told the same story to some independent person.

Accordingly Ryan was asked in re-examination had he told the story to his employer, Mr. Mellett, the day after he had been approached about signing the will, and that he had been offered the sheep. This was objected to on behalf of the plaintiff, and the objection was overruled, and Ryan answered in the affirmative.

Mr. Mellett was then called, and he gave his account of what he had been told by Ryan, which was in substantial agreement with Ryan's testimony in the box.

The question arises whether such evidence was admissible.

It was at one time held that the fact that a witness had made a previous statement similar to his testimony in Court could be relied on to confirm his testimony: *Luttrell v. Reynell* (1); but since the *King v. Parker* (2) it has been always held that such evidence is inadmissible. There is, however, an exception to the rule, and the question is, is the evidence in the present case within the exception?

In Phillips on Evidence, vol. ii, page 523, the exception is stated in the following terms:—"In one point of view, however, a former statement by the witness appears to be admissible in confirmation of his evidence; and that is where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship; in that case, perhaps, in order to repel such an imputation, it might be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts."

(1) 1 Mod. 282.

(2) 3 Douglas, 242.

The statement in Phillips is referred to in Taylor on Evidence, vol. ii, page 1070, in support of a proposition that evidence that a witness has on other occasions made statements similar to what he has testified in the cause is not admissible unless indeed he has been charged with a design to misrepresent in consequence of his relation to the party or to the cause, in which case it would be proper to show that he had made a similar statement before that relation existed.

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The principle is laid down by Holmes J. in *The Queen v Coll* (1) to the same effect. He said: "It is said that evidence that a witness has on other occasions made statements similar to what he has testified is admissible when he is charged with a design to misrepresent in consequence of his relation to a party in the suit, or where it is necessary to explain what he has said in cross-examination. Indeed, it seems to me that this branch of the law of evidence depends upon the principle which is applied every day in practice, that a witness has a right to explain a matter relied on in cross-examination for the purpose of discrediting him, provided that it is reasonably capable of explanation."

In the present case the witness was examined as to the various assaults made by him upon Thomas Flanagan, the sole beneficiary in the alleged will. These assaults commenced some eighteen months after the death of the alleged testator, and he was examined in reference to them with the express purpose of discrediting his testimony, and of leading the jury to believe that he had concocted the whole story. Undoubtedly at the time of the assaults there was a bad feeling between Tom Flanagan and Ryan, and this bad feeling was due to the fact that Flanagan had seduced Ryan's sister and that she had had a baby in consequence. It was essential, therefore, to show that at a time when the parties were professedly friendly, and before any occasion had arisen for a feeling of enmity between them, Ryan had told the same story to a respectable and faithworthy person such as Mr. Mellett was admitted to be. Ryan stated in answer to the judge that his friendly relations with Tom Flanagan continued for some eighteen months after the death of the deceased, and consequently Mr. Mellett's evidence as to the statement having been made to him

(1) 24 L. R. Ir. 522.

Appeal. within a day or at most two days after the alleged date of the
1917. forgery was very important in support of his evidence, and was, I
FLANAGAN think, properly admitted.

v.
FAHY. The judges in the King's Bench Division also held that even
Molony L.J. if the evidence was not properly admitted, they would not grant
a new trial on the ground that there was no substantial wrong or
miscarriage within the meaning of Order 39, rule 7. The applica-
tion of this rule to particular cases must always be a matter of
difficulty, and it is almost impossible to lay down any general
rule. If, however, I had come to the conclusion that the evidence
was wrongly admitted, I still think that in the circumstances of
the present case I would have refused to grant a new trial, but
having formed a clear view as to the admissibility of the evidence,
I do not think it necessary to discuss the authorities on the
application of this rule which have been referred to by the Lord
Chancellor further than to say that I am in general agreement
with the conclusions he has arrived at as regards the scope and
effect of the rule. I do not, however, understand the words of
Walker L.J. in *Tait v. Beggs* (1), referred to by the Lord
Chancellor, to lay down a hard and fast rule of universal applica-
tion, and I do not think the Lord Chancellor so understood them.
Each case has to be examined on its own facts, and if it is seen
that, apart from the illegal evidence, the preponderance of prob-
ability was all in favour of the verdict, it would in my opinion
be impossible to say that a substantial wrong or miscarriage had
been occasioned.

Solicitor for the appellant: *M. J. MacNamara.*

Solicitor for the respondents: *F. F. Cullinan.*

C. L.

(1) [1905] 2 I. R. 525, 530.

THE KING (AT THE PROSECUTION OF J. M. POER O'SHEA, *K. B. Div.*
D.I., R.I.C.) *v.* MARGARET O'NEILL (1). 1918.

April 11, 30.

War—Emergency Legislation—Defence of the Realm Regulations—Food Control—Bacon—Bacon, Ham, and Lard (Provisional Prices) Order, 1917 (1917. No. 1180)—Article 13—"Accurate Records,"

An invoice showing the quantity of bacon bought by the retailer, a railway receipt for the carriage of the bacon bought, and a list of prices of various "cuts" of bacon hung up in the retailer's shop are not "accurate records" within the meaning of article 13 of the Bacon, Ham, and Lard (Provisional Prices) Order, 1917 (1917. No. 1180).

CASE STATED under 20 & 21 Vict. c. 43.

On the 30th January, 1918, before the justices of the peace for the County Tipperary, sitting at Clonmel Petty Sessions, Margaret O'Neill was charged in a summons "for that she at Clonmel Borough on the 16th day of January, 1918, being a person dealing in bacon and hams, did not keep accurate records containing such particulars as were necessary to show whether or not she was complying with the provisions of Order No. 1180, Clause 13, made under the provisions of the Defence of the Realm Act, Ministry of Food, dated 17th November, 1917, so far as they related to her trade, and was thereby guilty of an offence against the Defence of the Realm Regulations."

Evidence was given by Serjeant West, R.I.C., that on the 16th January, 1918, he visited the shop of the defendant at Gladstone Street, Clonmel, and asked if she had any records of her dealings in bacon; that an invoice of the bacon purchased by the defendant and a receipt from the railway for the carriage of the bacon were produced and handed over to him, but that the defendant had no books. In reply to the Bench the serjeant stated that his reading of the Order, 1917, No. 1180, was that the defendant should have kept a record to show the various prices at which the various parts of the sides of bacon were sold to the public, and that the defendant had a list of prices hung up in her shop.

(1) Before GIBSON, MADDEN, and KENNY JJ.

K. B. Div. The invoice, railway receipt, and list of prices were produced.
 1918. The invoice was an ordinary invoice showing the purchase of
R. "two Wiltshire sides" by the defendant from Donnelly's at the
(O'SHEA) price of £6 2s. 11d., and the railway receipt was in the usual form
v. for the carriage paid on "one barrel of salt provisions." The list
O'NEILL. of prices was a notice in the following terms:—

BACON, HAM, AND LARD PRICES.

Home Produce.

Green Irish Hams,	...	...	...	...	2s.	2d.
Bacon—						
Green Irish middle, flank,	...	...	...	...	2s.	2d.
Foreshoulder,	...	...	...	...	1s.	10d.
Streaky,	...	...	...	...	1s.	10d.
Collar,	...	...	...	...	1s.	10d.
End of back,	...	...	...	...	1s.	10d.
Gams,	...	...	...	...	1s.	10d.
Rashers and centre of back;	...	...	...	...	2s.	0d.

The justices, being of opinion that the invoice, railway receipt, and list of prices were a sufficient record within the meaning of the Order, 1917, No. 1180, dismissed the complaint.

The case was stated, at the instance of the prosecution, for the opinion of the Court as to whether the justices were right in point of law in so deciding.

The material portions of the Bacon, Ham, and Lard (Provisional Prices) Order, 1917 (1917, November 17th) 1917, No. 1180, are as follows:—

13. Every person dealing in bacon, ham, or lard shall keep accurate records containing such particulars as are necessary to show whether or not he is complying with the provisions of this order, so far as they relate to him or to his trade, and shall make such returns as to his trade in bacon, ham, and lard as may from time to time be required by the Food Controller or a Food Committee. All such records and relevant documents, including invoices and dated statements of price, shall be open to the inspection of any person authorized by the Food Controller or the Committee.

17. Infringements of this order and (sic, query 'are') summary offences against the Defence of the Realm Regulations.

Devitt and Serjeant Matheson K.C., for the Crown.

A. V. Matheson, for Margaret O'Neill.

GIBSON J.:—

K. B. Div.

1918.

B.

(O'SHEA)

v.

O'NEILL.

The prosecution in this case was under the Bacon Order, 17th November, 1917, Article 15, which prescribes that every person dealing in bacon, etc., shall keep accurate records containing such particulars as are necessary to show whether or not he is complying with the provisions of the order; he is to make such returns as to his trade as may be required by the Food Controller; all such records and relevant documents, including invoices and dated statements of price, are to be open to inspection of the authorized official. The defendant was prosecuted for breach of this regulation in respect of two Wiltshire sides of bacon. She produced the invoice of the bacon with weight and price, the delivery receipt by the railway, and a notice in the shop of the various prices at which bacon was sold. The price varies according to the nature of the cuts; rashers are the dearest.

There was no record of the prices actually charged, or the sums realized from the sale.

The regulation in the same form is found in other food orders. There has been no decision on it.

It would be obviously oppressive to insist that each sale of a dearer or cheaper part of the bacon should be separately entered. The proper course would be to proceed against the trader if he sold in excess of the prescribed price. The difficulty and hardship of punishing an honest small trader because he did not keep elaborate books and accounts of his various petty sales are obvious; the regulation if enforced literally would unjustifiably embarrass traders; it ought to be only sparingly put in force, and only in serious cases.

The magistrates held that the invoice, railway receipt, and list of prices were a sufficient compliance with Regulation 15. We are of opinion that they were wrong in that determination, there being no record of any kind showing in bulk or in detail what was realized. We do not decide what records should contain. Regard should be had to kind of trade and business done. We shall remit the case to the magistrates, not to convict, but to proceed according to law, which will enable them, if they think fit, to take a lenient view, this being the first case in which the regulation

K. B. Div. 1917. has been sought to be applied, and its phraseology being loose and dangerously wide. If the defendant charged an excessive price, for that offence, capable of easy and certain proof, she could be made answerable.

R.
(O'SHEA)

v.
O'NEILL.

Gibson J.

I am of opinion that this perplexing body of food regulations should be the subject of some general considered circular for the guidance of the police which would relieve from unnecessary controversy or grievance from regulations being sporadically enforced or in cases where, for business purposes, literal compliance is practically impossible.

Solicitor for the Crown: *The Chief Crown Solicitor.*

Solicitor for Margaret O'Neill: *David J. Higgins.*

C. N. K.

K. B. Div. 1918. THE KING (AT THE PROSECUTION OF H. F. TAYLOUR,
April 15, 30. D.I., R.I.C.), v. THOMAS M'DONNELL, TRADING AS
"A. M'DONNELL, LTD." (1).

War—Emergency Legislation—Defence of the Realm Regulations—Food Control—Bread—Bread Order, 1917 (1917. No. 189)—Selling bread under weight—Even number of pounds weight—Weighing bread within thirty hours of completion of baking.

Article 7 of the Bread Order, 1917 (1917. No. 189), is an absolute prohibition against the sale of a loaf which does not weigh an even pound or even number of pounds weight.

Article 7 provides that bread may be weighed at any time within thirty hours after the completion of the baking. Where a loaf of bread is weighed at mid-day on the day on which it is delivered, *prima facie* the weighing is done within thirty hours of the completion of the baking, and the onus of proving the contrary is on the defendant.

CASE STATED under 20 & 21 Vict. c. 43.

On the 2nd March, 1918, before the justices of the peace for the county of Westmeath sitting at Mullingar Petty Sessions

(1) Before GIBSON, MADDEN, and KENNY JJ.

Thomas M'Donnell, trading as "A. M'Donnell, Ltd.," was charged in a summons that "he, without the authority of the Food Controller, did at Mullingar, . . . on the 26th day of February, 1918, unlawfully sell to Michael Lynam one loaf of bread which when weighed within thirty hours of the completion of the baking thereof was not of an even number of pounds weight, and that he did thereby act in contravention of the Bread Order, 1917 (189), and was guilty of a summary offence against the Defence of the Realm Regulations."

K. B. Div.
1918.
R.
(TAYLOUR)
v.
M'DONNELL.

The evidence on the hearing was stated in the case as follows:—

"Mary Kate Sheridan deposed that she was an assistant in the shop of Mr. Michael Lynam, of Mount Street, Mullingar; Mr. Lynam bought bread for re-sale. She remembered the 26th February, 1918; on that morning several loaves of bread were freshly delivered by the vanman of A. M'Donnell to her for Mr. Lynam, who bought them. One of these loaves, when weighed by Constable Foley later on in the day, about 12 o'clock noon, was one ounce short of two pounds weight.

"Constable Michael Foley, R.I.C., deposed that on the 26th February, 1918, in the course of his duty he visited the shop of Mr. Michael Lynam at about 12 o'clock, noon; he asked the assistant, Miss Sheridan, for some bread, and weighed the two loaves she produced. One of the loaves weighed only 1 lb. 15 oz., the other 2 lb. The loaf that weighed 1 lb. 15 oz. appeared to be as it left the baker's hands."

No evidence was given as to the time the bread was baked. Evidence was given by constables Foley, Gorman, M'Donagh, and Serjeant Campbell, R.I.C., that loaves of bread sold and delivered that morning to other bread retailers by A. M'Donnell, Ltd., were found when weighed to be from 1 lb. 13 oz. to 2 lb. 1½ oz. in weight. No evidence was given on behalf of the defendant."

The justices convicted, fining the defendant £1 1s. and costs, and directed his imprisonment for fourteen days in default of payment. The case was stated at the instance of the defendant for the opinion of the Court on the following questions:—

1. Whether any offence was disclosed against the defendant

K. B. Div. on the face of the summons? 2. Whether clause 7 of the Bread Order, 1917 (189), merely set up standards of weights for loaves of bread, or whether it should be construed as absolutely prohibiting the sale of any loaf that did not weigh one pound or an even number of pounds? 3. Whether under the Bread Order, 1917 (189), a baker is or can be made responsible for the weight of bread when found on the premises of a purchaser to whom it has been sold and delivered; and 4, whether in the circumstances the justices were right in point of law in their determination in convicting the defendant?

The material portions of the Bread Order, February 26th, 1917 (No. 189), are as follows:—

“1. No bread which has not been made at least twelve hours shall be sold or offered or exposed for sale.

“6. All bread shall be sold by weight and not otherwise, except bread sold for consumption on the premises of the seller.

“7. No loaf of bread shall be sold or offered or exposed for sale unless its weight be one pound or an even number of pounds.

“9. Any person authorized by the Food Controller or any inspector of weights and measures may require any person offering or exposing any bread for sale to weigh such bread in his presence, and may also require any person in the course of delivering any bread to permit him to weigh such bread.

“10. For the purpose of this order bread may be weighed at any time within thirty hours of the completion of the baking thereof but not later.

“If any person acts in contravention of this order or aids or abets any other person in doing anything in contravention of this order that person is guilty of a summary offence against the Defence of the Realm Regulations.”

Farrell and Wylie K.C., for M'Donnell.

Devitt and Serjeant Matheson K.C., for the Crown.

GIBSON J.:—

The defendant was convicted of selling to Lynam, a shop-keeper in Mullingar, on the 26th February, 1918, a loaf, which, when weighed within thirty hours of the completion of the baking, was not of an even number of pounds weight. The loaf was one of several freshly delivered that morning to Lynam from the defendant's bakery. At 12 o'clock noon, Foley, a constable, got the loaf in question from Lynam, which, on being weighed, proved not to be of even weight. It was under weight, as were

several others sold that morning by the defendant to other retailers. K. B. Div.
1918.

The effect of the order founding the prosecution has been considered and decided by the King's Bench Division in England in *Hildreth v. Louis* (1). It means what it says: each loaf must be of even pound's or pounds' weight, though trifling overweight in the purchaser's favour would not support a complaint. R.
(FLOUR)
C.
M'DONNELL.
Gibson J.

We are of opinion on the facts that the conviction was right. Though proof of breach is easier if the weighing is on the occasion of delivery by the baker to the retailer, breach may be proved by weighing subsequently, if the time of weighing is such as to supply the necessary evidence. The loaf having been weighed at noon, and being one of a fresh delivery, was *prima facie* the result of baking completed within thirty hours before. If the baker could have proved that his bread was at noon thirty hours old—a very unlikely thing—he did not do so. The matter of excuse was peculiarly within his own knowledge, and should have been established by him.

The questions in the case will be answered as follows:—
No. 1—Yes. No. 2—The order is an absolute prohibition in every case where the completed loaf sold is under weight of what the purchaser is buying, though it may be otherwise if the loaf sold is over weight in the purchaser's favour. No. 3—Yes. No. 4—Yes.

Solicitor for A. M'Donnell & Co.: *Edward A. Shaw.*

Solicitor for the Crown: *The Chief Crown Solicitor.*

C. N. K.

(1) [1918] W. N. 5; 82 J. P. 59.

K. B. Div. THE KING (AT THE PROSECUTION OF P. M'ENTEE, D.I., R.I.C.)
1918. *v. MICHAEL E. SMYTH* (1).

April 15, 30.

*War—Emergency Legislation—Defence of the Realm Regulations—*Food Control—Butter—Butter (Maximum Prices) Order, 1917 (1917. No. 913); Butter (Maximum Prices) (Amendment) Order, 1917 (1917. No. 1110)—Selling by retail—Retail price exceeding actual cost by more than 2½d.—Actual cost—Onus of proof.*

Under the Butter (Maximum Prices) Order, 1917 (1917. No. 913), the maximum retail price of butter is fixed at a price not exceeding by more than 2½d. the "actual cost" of the butter to the retailer. Such "actual cost" is the net price paid by the retailer (not exceeding the maximum wholesale or first-hand prices fixed by the order), plus money actually paid for transport not included in that price.

Under article 10 of the Butter (Maximum Prices) (Amendment) Order, 1917 (1917. No. 1110), it is provided that a person, on buying butter, may rely on any written statement made by his vendor as to the money or moneys paid or payable by such vendor in relation to the butter sold. A retailer in order to show that his retail price does not exceed by more than 2½d. the actual cost, and to fully protect himself, should obtain a written statement from his vendor as to the money or moneys paid or payable by the vendor in relation to the butter sold, and must ascertain whether the price charged by the vendor, having regard to such statement, does not exceed the maximum price chargeable by that vendor to him.

CASE STATED under 20 & 21 Viet. c. 43.

On the 8th March, 1918, before the justices of the peace for the County of Cavan, sitting at Cavan Petty Sessions, Michael Smyth was charged in a summons "that he on the 16th day of February, 1918, did at Cavan sell one pound of butter by retail to one Patrick Smith, junr., at a rate per lb., viz., 2s. 6d., exceeding by more than 2½d. the actual cost of the butter sold, contrary to the Butter (Maximum Prices) Order, 1917, dated 31st August, 1917, as amended."

The sale of the pound of butter at 2s. 6d. to Smith was admitted by the defendant, and it was proved that the butter was "keg" butter, and had been bought by the defendant in the market at 2s. 4d. per pound. The justices held that the defendant, having bought the butter at 2s. 4d. per pound, was entitled, within the

(1) Before GIBSON, MADDEN, and KENNY JJ.

order under which he was prosecuted, to sell at 2s. 6d. the pound, and dismissed the complaint. The case was stated at the instance of the prosecution for the opinion of the Court as to whether the justices were right in point of law in so deciding.

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The material portions of the Butter (Maximum Prices) Order (1917, August 31st), No. 913, and the Butter (Maximum Prices) (Amendment) Order (1917, October 31st), No. 1110, are as follows:—

Butter (Maximum Prices) Order, 1917, No. 913—

Clauses 2 and 3 make provisions as to wholesale prices.

Clause 4 (*a*). On and after the 10th September, 1917, no person shall sell butter by retail at a rate per lb. exceeding by more than 2½d. the actual cost to him of the butter sold.

(*b*) An additional sum, not exceeding ½d. per lb., may be charged for giving credit and for delivery otherwise than by post or rail. No additional charge may be made for packages.

(*c*) The actual cost shall in the case of all butter (other than butter imported by the person in question) be the net price paid for such butter (not exceeding the maximum price applicable under Clause 2 hereof), together with all moneys actually paid for transport not included in such price; and in the case of all butter ("imported or made by the person in question," added by the amending order), in respect of which there is for the time being a first-hand price in force, shall be the first-hand price in force at the time of sale, together with any moneys actually paid for transport in the United Kingdom.

6. A person shall not sell, or offer for sale, or buy, or offer to buy, any butter at prices exceeding the maximum prices provided by or under this order, or in connexion with any sale or disposition of butter, enter or offer to enter into any artificial or fictitious transactions or make any unreasonable charge.

Butter (Maximum Prices) (Amendment) Order, 1917, October 31st, 1917 (1), No. 1110—

1. The Butter (Maximum Prices) Order, 1917, is in this order referred to as the "principal order."

10. Where the maximum price at which butter may be sold by any person depends upon the amount of any sum or sums paid or payable in relation thereto by any former seller, such person shall be entitled to rely upon any written statement as to the amount of the sum or sums so paid or payable that may have been made to him by the person from whom he bought the butter, unless he has reason to suspect the truth of such statement.

Devitt and Serjeant Matheson, for the Crown.

(1) By a circular issued by the Food Control Committee for Ireland dated March 28th, 1918, the "estimated price" for creamery butter was set out at 2s. 3½d. per lb., and for factory or farmers' butter at 2s. 3¼d. per pound.

K. B. Div

GIBSON J. :—

1918.

R.

(M'ENTEE)

v.

SMYTH.

This was a prosecution against the defendant, a retailer, for selling butter at 2s. 6d. per pound, exceeding by more than $2\frac{1}{2}d.$ the actual cost, contrary to the Butter (Maximum Prices) Order, 31st August, 1917, as amended. The butter so sold was "keg" butter, as to which the prices are only described as "estimated prices." Such estimated price was: for creamery butter, 2s. $3\frac{3}{4}d.$ per lb.; and for factory or farmers' butter, 2s. $3\frac{1}{4}d.$ per pound. The retailer was to sell at a rate per pound not exceeding by more than $2\frac{1}{2}d.$ the actual cost to him of the butter sold. The estimate was based on the maximum retail prices not exceeding the prices so specified having regard to the actual cost to the retailer. The defendant had purchased the butter in the market at 2s. 4d. per pound, so that if that was the ruling price, the estimate was falsified in actual experience, and the price charged by the retailer was not over $2\frac{1}{2}d.$ on the actual price he paid. The word "estimated" introduces elements of variability, depending on the cost to the merchant selling to the retailer, and on the cost to the retailer, who might have to pay carriage, &c. First-hand or wholesale prices were fixed by the order of 31st August. The reference to "estimated prices" occurs in the order or circular of March 28th, 1918. The order of August 31st, 1917, purports in article 4 absolutely to prohibit sale by retail at a price exceeding by more than $2\frac{1}{2}d.$ the actual cost. Prima facie the retailer committed no offence, unless he bought at an excessive price, that is a price which his vendor was not allowed to charge. As the actual cost to the wholesale dealer would not be known to the retailer, it would be obviously unreasonable to blame the latter for delinquencies of the former; and the Court was disposed to affirm the justices' dismissal, till attention was called to article 10 of the order of October 31st, 1917, which provided that a purchaser may rely upon any written statement by his vendor as to the sum or sums paid by him for the butter. This would appear to show that a retailer buying at a price prima facie in excess of the wholesale price must protect himself by such written statement, which here the defendant did not do; he did not, therefore, show that the estimated price was inapplicable. These butter regulations are so.

complicated and so difficult to fit into ordinary business arrangements of fair or market that the defendant's apparent violation of them is on its face a venial transgression. Though the Court reverses the decision of the justices, having regard to the order of October 31st, 1917, not brought before the Bench below, the prosecution may well be allowed to drop. It always suggests hardship when the retailer is made responsible for an overcharge made by his vendor, who is not sued. On a small sale in a market a retail buyer would hardly ever think of getting a written assurance from the seller; the defendant, doubtless, knew nothing of this 31st October, 1917, order, and he acted, as most persons would, on the assumption that he was under no duty to investigate how the seller's price was arrived at. His attention was directed to his own retail price.

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1918.

R.
(M. E. E. TEE)

SMYTH.

Gibson J.

Solicitor for the Crown: *The Chief Crown Solicitor.*

C. N. K.

JOSEPH FULHAM, APPELLANT, v. ALEXANDER
CAULFIELD, RESPONDENT (1).

K. B. Div.
1918.

April 15.

Justices—Jurisdiction—Ejectment—Summary Jurisdiction (Ireland) Act, 1851
(14 & 15 Vict. c. 92), s. 15—"House"—*Stable and car-house.*

The owner or occupier of premises consisting of a house, yard, stable, and car-house, can eject his sub-tenant of the stable and car house under section 15 of the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict. c. 92), although the sub-tenant does not use either building for the purposes of human habitation.

CASE STATED, under 20 & 21 Vict. c. 43, by the justices of the peace in and for the County of Kildare, sitting at Celbridge Petty Sessions, on the 7th January, 1918.

The portions of the case stated material to this report may be summarized as follows:—

Joseph Fulham, the appellant, was summoned by the respondent, Alexander Caulfield, to show cause why he should not deliver up possession of "all that and those a stable, car-house, and premises situate in the Main Street, Maynooth." The summons was entitled, "Summary Jurisdiction (Ireland) Act,

(1) Before GIBSON, MADDEN, and KENNY JJ.

K. B. Div. 1851, and Petty Sessions (Ireland) Act, 1851, 14 & 15 Vict. 1918. caps. 92 & 93, Landlord and Tenant, Small Tenements in Towns, &c. Form B." At the hearing before the justices on the *FULHAM* *v.* 7th January, 1918, Fulham was represented by his solicitor, *CAULFIELD.* Mr. Brady, and Caulfield by Mr. Friery. Mr. Brady, amongst other objections, raised the preliminary point that the Bench had no jurisdiction to adjudicate, as the premises sought to be recovered were not any house or any part of a house within the meaning of sect. 15 of the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict. c. 92). The justices overruled this preliminary objection. Caulfield was examined, and stated that he had acquired the post office and yard, stable, and car-house from a Miss Collins, and that Fulham was then in possession of the stable and car-house under a tenancy from Miss Collins. At the time he became landlord he did not personally know how Fulham held the premises, but was informed that he held as a weekly tenant at 2s. 6d. weekly. The defendant paid him sums of money from time to time in respect of the rent, but never in weekly payments of 2s. 6d., but in various sums at different periods at the rate of 2s. 6d. per week. Fulham was not examined, and Mr. Brady on his behalf again asked the justices to dismiss the summons on the point he had raised. The justices declined to accede to this request, and, holding that the stable and car-house were held under a weekly tenancy, which had been duly determined by notice to quit, and were part of a house, being portion of the house used by Caulfield as a post office, and had been let to Fulham by Miss Collins as a stable and car-house, they made the following order:—"Defendant ordered to give up possession within a period of not less than seven nor more than ten clear days from the 7th January, 1918, warrant not to issue pending the decision of a case stated for the Superior Court."

The opinion of the Court was sought as to whether the justices were right in point of law in making such order.

J. F. Moriarty, for the appellant:—

"House," under sect. 15 of the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict. c. 92), means a dwelling-house or house used for habitation. That is shown by the reference in

the section to "occupation." Occupation in this context refers to living in the house. "House" is defined in Stroud's Judicial Dictionary (Title H) as "a structure of a permanent character . . . that is used or may be used for the habitation of man." Occupation is also referred to in the enactments dealing with cottier tenancies. Here the house must be a dwelling-house: *Caiger v. St. Mary's, Islington* (1); *Surman v. Darley* (2); *Deasey v. Hickey* (3).

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CAULFIELD.

There was no proof of any tenancy. The only thing in the case is a statement which the respondent alleged was made to him. That is not evidence, and the payments made were admittedly, not made weekly. The order is bad, as infringing the Courts (Emergency Powers) Acts (4 & 5 Geo. 5, c. 78, s. 1; 5 Geo. 5, c. 19) and the rules made thereunder. The order commands the issue of a warrant—that is, it commands execution in contravention of these statutes and rules.

Devitt, for the respondent :—

No point was raised before the justices as to their inability to make the order in the form made, by reason of the Courts (Emergency Powers) Enactments. That point at most only affects execution, and the plaintiff below must and can make a new substantive application for liberty to execute his order. The tenancy was, at least *prima facie*, set up on the proof; the respondent took the premises subject to a tenancy in the appellant in respect of the stable and car-house; and he was paid sums from time to time by the defendant on the basis of 2s. 6d. a week. It lay upon the appellant to rebut this proof if he was able, and he gave no evidence.

The premises come within the provisions of sect. 15 of the Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 Vict. c. 92). They are part of the curtilage of the post office and premises which the respondent holds, and it is absurd to contend that he must resort to the Civil-bill Court to eject the tenant of a stable and car-house.

Moriarty, in reply.

(1) 50 L. J. M. C. 59, at p. 63. (2) 14 L. J. M. C. 145. (3) 5 N. I. J. R. 209.

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GIBSON J. :—

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Three grounds were argued before us on behalf of the defendant, on two of which we have no difficulty. The first of these two points is as to the application of the emergency powers legislation to the proceedings taken against the defendant under the Summary Jurisdiction (Ireland) Act, 1851, sect. 15. We are of opinion that this legislation only applies after judgment has been obtained, and that although the order in the present case may be bad in form as to the issue of a warrant, it is in substance right, although the plaintiff cannot under the emergency legislation proceed to execution without an application *de novo* to the justices. The second point which we think clear is the contention that there was no evidence of any tenancy. No doubt the evidence was of a loose character. It is stated in the case that a statement was made that the defendant held under a weekly tenancy, but it does not appear by whom that statement was made. Of course it would be evidence of a tenancy, if it had been made by the defendant himself, or even if made by the former landlord as being a statement made against interest. Evidence, however, was given of substantial payments made from time to time by the defendant. No doubt, these were larger sums than weekly payments, but, in my opinion, may be construed as describing a real dealing assented to by the payer and payee; they called for contradiction or explanation by the defendant if this was not the case. The defendant could have been examined as to the relation between him and the plaintiff, but he gave no evidence.

On these two points we must, therefore, decide against the defendant. There remains the third point argued, which alone suggested any difficulty. This was whether a stable or car-shed came within sect. 15 of the Summary Jurisdiction (Ireland) Act, 1851. If it does not, the appeal must succeed. Mr. Moriarty contended that, to come within that section, a house must be used for the purposes of human habitation, and he supports that view by reference to the provisions as to "occupation" contained in the section, and by the language of the enactments as to cottier tenancies contained in the Landlord and Tenant (Ireland) Act,

1860. It is plain that the section only applies to what is physically a house. Usually a house is a permanent structure of masonry or wood. The character of the building does not depend upon its use, but upon its nature. I am unable to see any logical reason for holding that where a landlord lets a house to which this legislation applies, he should be able in a summary way to get possession, but that if he lets the stable adjoining such house, he should be unable to avail himself of the summary procedure provided by the section. The English enactment avoids any difficulty, as in it the word "land" is used in addition to "premises."

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CAULEY

Gibson J.

The tenement here consisted of a post-office, with a yard and stable. It was all one holding, subject to one rent. The plaintiff's predecessor in title held the post-office, but did not want the stable, which was accordingly let to the defendant. The plaintiff took an assignment of the post-office and of the reversion in the tenancy of the stable. At any moment the plaintiff might require possession of the stable. If the whole of the premises had been sublet to the defendant, it is admitted that he would have had no answer. Does the accident that part only of the premises was so sublet make it impossible for the plaintiff to recover by summary ejectment?

The legislation was evidently aimed at enabling a landlord to get possession of small tenancies without expense. The late Lord O'Brien C.J., in a case in which my brother Madden and I were members of the Court, expressed an opinion that a shed in a yard not held in conjunction with a dwelling-house might be the subject of proceedings under this section. I would gather that part of the building was used or was capable of being used for the purpose of human habitation. I expressed no opinion on that point, and the dictum would not in any case be a binding authority upon this Court. In my opinion it is impossible to hold that here the plaintiff, who was the tenant of a single integer consisting of a house, yard, and stable, could not eject his sub-tenant of that stable by summary procedure. The proceeding under the statute in respect of the stable was therefore within jurisdiction.

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MADDEN J.:—

The substantial question argued before us was whether the house, or part of a house, held by the defendant came within the provisions of the Summary Jurisdiction (Ireland) Act, 1891, sect. 15. It is stated in the case that the defendant held a stable or car-shed which was only part of premises which consisted of a post office, with yard, and this stable or car-shed. I am of opinion that the part of the premises sublet to the defendant comes within the statute. I entirely agree that it would be singular that the Legislature should have intended that a different power should be given in the case of human habitation from that which existed in respect of buildings used for cattle, or similar purposes, and that it is impossible to hold that the Legislature intended that in respect of the latter class of buildings the landlord should be put to the expense of proceedings in the County Court, while as to the former he could avail himself of the summary procedure under the statute under consideration. I think the statute applies to premises, or part of premises; and I see no difficulty in that application. No doubt "house," in a superficial view, implies a building occupied for habitation; but I find in the New English Dictionary that, from the year 1586, the word "house" has been held properly applicable also to buildings used for the accommodation of cattle. I see no reason why the provisions of the Summary Jurisdiction (Ireland) Act, 1851, should not apply to the tenancy in this stable or shed. I entirely agree with all that has been said by my brother Gibson on this and the other points argued before us.

KENNY J. concurred.

Solicitor for the appellant: *James Brady*.Solicitor for the respondent: *Christopher Friery*.

C. N. R.

MARTIN FITZGERALD, PLAINTIFF, v. SAMUEL ROWAN
 WATSON, DEFENDANT (1).
 (1917. No. 7202.)

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 1918.

Jan. 29.
 Feb. 1

Appeal.

Feb. 14, 15,

Practice—Interrogatories—Libel—Interrogatory asking for names of informants.

In actions for libel, other than actions against newspapers, where the defence is publication on a privileged occasion, an interrogatory asking for the names of the persons on whose information the defendant acted in publishing the words complained of, will in general be permitted, and the defendant ordered to disclose such names. In the absence of circumstances showing that the information asked for is sought for some ulterior purpose, such interrogatory is relevant to the issue of malice, and material to the plaintiff's case.

In an action for libel, the defendant having pleaded publication on a privileged occasion, the plaintiff administered, *inter alia*, the following interrogatories, i.e.:—"What information had you when you published the said words which induced you to believe that the allegations in the said words complained of were true, or, what steps (if any) did you take before writing the words to ascertain whether they were true?" and, "From whom did you obtain the information on which you relied in publishing the matters complained of?" The defendant answered the first half of the former interrogatory, but refused to answer the second half, or the latter interrogatory.

Held by the Court of Appeal, affirming the King's Bench Division (Sir Ignatius J. O'Brien diss.), that both these interrogatories were proper; that, as to the former, the language left it in doubt as to whether it was alternative in form, and the defendant was entitled to answer it as he had done; that the latter interrogatory was relevant to the issue of malice and material to the plaintiff's case, and should be answered by the defendant.

MOTION on behalf of the plaintiff to strike out the answers of the defendant to interrogatories administered to him by leave of the Court.

The action was brought by the plaintiff for libel arising out of statements made and published by the defendant in a letter.

(1) Before PIR and GORDON JJ.

K. B. Div. 1918. The defence was substantially that the words complained of were published on a privileged occasion. The only interrogatories material to this report were the 4th and 5th. The 4th interrogatory was as follows :—"What information had you when you published the said words which induced you to believe that the allegations in the said words complained of were true ; or what steps, if any, did you take before writing the words to ascertain whether they were true ?" The defendant treated this as being an interrogatory in an alternative form, and answered only the first portion. The 5th interrogatory was : "From whom did you obtain the information on which you relied in publishing the matters complained of ?" To which the defendant replied : "The information was received by me confidentially while I occupied a responsible and confidential position. I submit that it would be oppressive to require me to answer said interrogatories, and to do so would render necessary the disclosure of the names of my witnesses, to which I object."

The arguments are sufficiently referred to in the judgments of the Court.

Charles Power (with him *Serjeant A. M. Sullivan*) referred to *Elliott v. Garrett* (1) ; *White & Co. v. Credit Reform and Credit Index, Ltd.* (2) ; *Edmondson v. Birch* (3).

Henry K.C. and *E. Collins*, for the defendants, referred to *Plymouth Mutual Co-operative and Industrial Society v. Traders Publishing Association, Ltd.* (4) ; *Maas v. Gaslight and Coke Co.* (5) ; *Murray v. "Northern Whig"* (6) ; *Mackenzie v. Steinkopff* (7) ; *Parnell v. Waller* (8) ; *Hennessey v. Wright* (9) ; *Adam v. Fisher* (10).

Serjeant A. M. Sullivan, in reply.

(1) [1902] 1 K. B. 870.

(2) [1905] 1 K. B. 653.

(3) [1905] 2 K. B. 523.

(4) [1906] 1 K. B. 403.

(5) [1911] 2 K. B. 543.

(6) 46 I. L. T. R. 77.

(7) 6 T. L. R. 141.

(8) 24 Q. B. D. 441.

(9) 21 Q. B. D. 509.

(10) 110 L. T. R. 537.

PIM J.:—

In this case the plaintiff has, by leave of the Court, administered to the defendant five interrogatories. Of these we are only concerned with numbers 4 and 5. The 4th interrogatory reads as follows:—"What information had you when you published the said words which induced you to believe that the allegations in the said words complained of were true; or what steps, if any, did you take before writing the words to ascertain whether they were true?" This interrogatory contains two limbs, and the defendant has answered the first and left the second unanswered.

The plaintiff contends that the defendant should be compelled to answer both limbs of the interrogatory. The defendant replies that the question is couched in an alternative form, and that he was entitled to choose which alternative he would answer.

The plaintiff says that the word "or" in the question is not disjunctive, but is to be regarded rather as a word of connexion. He further argues that the information asked for in the two parts of the query is wholly distinct, and that there is no alternative between them; that in fact the answer to one will not, in any view of the matter, render unnecessary an answer to the other.

I am inclined to think, not only that the two limbs of the query are legitimate and proper, but that the plaintiff is correct when he states that the word "or" was used by him as a word of connexion, and not disjunctively. But I cannot say it is wholly unreasonable for the defendant to read the question in the way he says he read it, that is alternatively. In any case the question is manifestly ambiguous, and it is the fault of the plaintiff that the ambiguity exists; and I do not think that this Court has any power where a question is clearly ambiguous to force a suitor to adopt one or other view of its possible meanings. The plaintiff can, if he wishes, make a further application to the Court for leave to put the second part of the question as a further interrogatory; but, as the matter stands, I am of opinion that the defendant is entitled to rely on the contention he has put forward, and that the interrogatory must be held to have been answered.

The 5th interrogatory is as follows:—"From whom did you obtain the information on which you relied in publishing the

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K. B. Div. matters complained of?" The defendant has refused to answer
 1918. this question, stating that the information was received by him
 FITZGERALD confidentially while he occupied a responsible position as director of
 v. the company, and that it would be oppressive to require him to
 WATSON. give the names of his informants.
 Pim J.

The matter is one of much difficulty and importance. Many cases have been referred to by counsel on both sides, and the defendant has attempted to establish a rule which would govern similar applications in all cases of libel. I think he has failed in that contention. There is no absolute rule governing the matter; but in respect of "newspaper libels" a certain rule of practice has undoubtedly grown up under which the Court, in the absence of any special reasons to the contrary, will not order a defendant to give the names of his informants. No such rule of practice exists in respect of libels by individuals; and so far as the trend of decision has gone in such cases, it would appear that the tendency is to establish a rule of practice of an opposite character, namely, that the interrogatory will be permitted where there are no special circumstances which would make it illegitimate or oppressive.

In Ireland no application of the kind has, so far as I can ascertain, as yet come before the Courts; but in England, in the year 1905, in a case of *White & Co. v. The Credit Reform Association and Credit Index, Ltd.* (1), Sir Richard Henn Collins, then Master of the Rolls, and Lord Justice Mathew allowed the interrogatory. The case was not unlike the case before us. The defendants were what is called a "trade protection society." They published a book called "The Credit Index," with a key-card to be used with it, which was circulated among the subscribers. In "The Credit Index" were entered the names of traders, a letter and number being placed against each name. On reference to the key-card it appeared that the letter indicated the estimated pecuniary strength of the trader. The plaintiffs in that case, being one of the trading firms whose names appeared on "The Credit Index," brought an action for libel against the association. The defendants pleaded privilege, and stated that the names had been published in good faith and without malice. The plaintiffs asked

leave of the Court to put to the defendants, amongst others, the following interrogatory:—"From whom did the defendants obtain the information upon which they had relied in making the statements complained of?" The Master of the Rolls and Lord Justice Mathew allowed the interrogatory on the ground that it was relevant to the issue of malice; that any question aiming at the condition of the mind of the person publishing the alleged defamatory statement, the amount of information upon which he acted, and the means taken by him to ascertain the truth of that statement were legitimate subjects for interrogatories; that if these were legitimate subjects for interrogation, there was no reason why the Court should stop there; and that an inquiry as to the persons to whom the defendants had applied for information could not, in respect of the issue as to the condition of mind, be severed from the information received. The learned Master of the Rolls (at p. 658) said:—"I can see no principle on which, or reason why, such a severance should be made." But he went on to say that if there were grounds for the suggestion that the inquiry was not bona fide for the purposes of the action, but was made for other purposes than those for which the law allows interrogatories, it would then be oppressive and illegitimate, and ought not to be allowed.

In the case of *Edmondson v. Birch & Co.* (1) a similar application was made to the Court. The Court of Appeal (consisting of Lord Justice Romer and Lord Justice Mathew) refused to permit the interrogatory in this case, on the ground that it was clearly made for an illegitimate purpose, namely, for the purpose of obtaining the names of other people against whom actions might be instituted. Neither judge expressed any disapproval of the decision in *White v. The Credit Reform Association* (2), and it may be inferred from the judgment of Lord Justice Mathew that but for the illegitimate purpose for which the question was asked he would have made the order prayed for.

A similar application was made to the Court in the case of *Adam v. Fisher* (3), which also was refused, but on the ground that the respondent in that case, who was responsible for the organization of the political constituencies in the whole metropolitan area of

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Pim J.

(1) [1905] 2 K. B. 523.

(2) [1905] 1 K. B. 653.

(3) 110 L. T. R. 537.

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Neither Lord Justice Mathew nor Lord Justice Phillimore, who decided that case, made any objection to the decision in *White v. The Credit Reform Association* (1). I may say, parenthetically, that in that case Lord Justice Buckley admits that a different rule governs newspaper libels, for he says in his judgment:—"In the course of the discussion I asked whether counsel could furnish a reason why the newspaper should be treated in a different manner from other people in this matter" (p. 539). And he went on to say that he had received no satisfactory reply, but that it occurred to him (Lord Justice Buckley) "that a newspaper stands in such a position that it is not desirable on grounds of public interest that the name of a newspaper informant should be disclosed" (p. 540).

From none of the cases—and they are many—which have been decided on newspaper libels is it quite clear what the reasons were which induced the judges to treat such cases differently from cases of libels by individuals. Serjeant Sullivan, on behalf of the plaintiff, gave us a very cogent reason for the difference. He said that if a newspaper pleads fair comment, as it always does, the onus is on the defendant, the newspaper, to prove its plea; but if a defendant pleads privilege, the onus is on the plaintiff of proving malice, and if he fails to give evidence of malice, he will be non-suited at the conclusion of his case.

Now herein, it seems to me, lies the principal reason for the decision in *White & Co. v. The Credit Reform Association* (1); and in that respect I do not think it differs from the case before us. It would have been almost impossible in that case, no matter how bad the libel might have been, for the plaintiffs to prove malice or to give any evidence of malice, unless they knew what information had been given to the defendants, and from whom the defendants had received the information. The case before us is, perhaps, not quite so strong; but still it seems to me that, unless the plaintiff gets the information which he is seeking, he may have the greatest difficulty in his proof of malice.

From this point of view the relevancy of the query is beyond all question. The case of *White & Co. v. The Credit Reform Association* (1) has not been anywhere questioned, and it was expressly approved of by Lord Justice Fletcher Moulton in the *Plymouth Mutual Co-operative and Industrial Society v. The Traders Publishing Association* (2).

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From the very beginning of the arguments in this case I have been impressed with the seriousness of the question raised. It seemed to me that it touched a matter of public policy which deserves close consideration. Traders are in the habit of applying to each other from time to time for information as to the position and credit of other traders, and statements made in such circumstances are as a rule regarded as highly confidential. If such confidential information has to be disclosed in a case of this kind, the result may be to affect seriously what may be called the "comity of merchants," and thus to affect the conduct of trade in the country. But while recognizing that aspect of the case, I think that Courts of first instance should hesitate before they base their judgments on what appear to them to be reasons of public policy. That is rather a matter for the Legislature than for Courts of justice. The rights of individuals are the matters which the Courts have primarily to consider and decide, and not the effect which their decisions may have on the body politic. At all events, if public policy is to be invoked to prevent a litigant getting what the law otherwise would give him, the decision should not come from a Court of first instance, but from the Court of Appeal. The same question of public policy existed in the case of *White & Co. v. The Credit Reform Association* (1), but it did not prevent Sir Richard Henn Collins from making the order asked for. He, at all events, did not regard the interrogatory as oppressive.

In my opinion there are no special reasons in this case which take it out of the decision in *White & Co. v. The Credit Reform Association* (1). The plaintiff is therefore entitled to have an answer given to the fifth interrogatory, and, as my colleague agrees with me, the application will be granted with costs.

(1) [1905] 1 K. B. 653.

(2) [1906] 1 K. B. 403.

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The allowance or disallowance of interrogatories, or the enforcement or non-enforcement of answers to them, are matters for the discretion of the Court, and should be dealt with in accordance with the merits of the particular case, keeping in view the object that justice should be done to each party without oppression of either.

I, of course, express no opinion as to the merits of the present case; but the position of a plaintiff who has been libelled, and who is met with a plea that the occasion on which the libel was published was privileged, may be, and frequently is, one of great difficulty. If the judge who tries the case holds that the occasion was privileged, the plaintiff must fail unless he can establish that the publication was malicious. This, of course, involves the question of the mental attitude of the defendant towards the plaintiff at the time of the publication. Though this may be inferred from acts or conduct of the defendant towards the plaintiff on other occasions, or from the very terms of the libel itself, yet one of the most important ways in which it may be established is by ascertaining whether the defendant had any, and if so what, grounds for making the statements contained in the libel. After the judge's ruling the defendant might not be examined, and there might be no opportunity for cross-examining him. It would seem to me, therefore, that it is not unreasonable that a defendant in such a case should be required to answer interrogatories such as are before us here, unless there is some good reason adduced to the contrary. In the case of *Elliott v. Garrett* (1), where privilege was pleaded, the Court of Appeal in England held that an interrogatory similar to No. 4 in this case was proper. In *White v. The Credit Reform Association* (2), with the same plea, the same Court, but not the same judges, not only held that No. 4 was proper, but also that No. 5 was equally admissible. The Master of the Rolls, Sir R. Henn Collins, said—"If there is to be an investigation into the motives of the person publishing the libel, it is essential to know all the facts; and it is obvious that if the information upon which he acted was procured from a person or

(1) [1902] 1 K. B. 870.

(2) [1905] 1 K. B. 653.

persons who could not possibly know anything about the matters in question, and he nevertheless published the statements complained of as if they were based on sufficient information, that might be cogent evidence of malice. To sever the question from whom such information was obtained from the question whether any and what information was obtained, appears to me quite illogical. I can see no principle on which, or reason why, such a severance should be made" (p. 658). In *Edmondson v. Birch & Co.* (1), in the same Court, both these cases were cited, and were not in any way disapproved of; but the Court was of opinion that the names of the defendant's informants were required for the purposes of bringing action against them, and not for establishing the plaintiff's case in the action itself, and therefore refused to allow the interrogatory corresponding to No. 5 in this case. But then we are referred to another series of cases against newspaper proprietors in which, where fair comment had been pleaded, similar interrogatories have been disallowed, beginning with *Hennessey v. Wright* (2), and coming down to *Plymouth Co-operative and Industrial Society, Limited v. Truders Publishing Association, Limited* (3); and attention is drawn to the fact that the judges state that there is no difference in principle between the case against a newspaper proprietor and that against any other member of the community, and also that "unfairness" as well as "malice" depends upon the state of mind. There are two observations which I would make in reference to these cases—1st, that they all relate to newspapers, and that when newspaper proprietors take upon themselves the responsibility for the libel, they are not as a rule required to give the names of their informants or of the writers of the articles complained of; and 2nd, that in such cases the defendant has to show that the matter was one of public interest; the jury determines whether the comment was or was not fair; and in order to be fair it must be based on facts. Having regard to these matters, the Courts have held that the plaintiff must show some special grounds why such an interrogatory as No. 5 should be allowed in the case of newspapers. I do not think, therefore, that these cases are in conflict with the cases to which I have previously referred.

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(1) [1905] 2 K. B. 523.

(2) 21 Q. B. D. 509.

(3) [1906] 1 K. B. 403.

K. B. Div. Is there any valid reason in this case why the interrogatories
 1918. should not be answered? I think not. If the matter complained
 FITZGERALD of is a libel, I think the plaintiff is entitled to know all the facts
 v. so as to be able to discharge, if he can, the onus thrown upon him
 WATSON. of proving that the defendant acted maliciously, should it be held
 Gordon J. that the occasion was privileged. It is true that if the names are
 given, the parties may themselves be open to an action by the
 plaintiff for defamation. but they may be able to meet this by a
 denial, by justification, or perhaps by a plea of privilege. How-
 ever inconvenient it may be to them, we cannot on that account
 refuse the plaintiff what we consider he is entitled to.

As to the fourth interrogatory, I agree with Mr. Justice Pim
 in thinking that it was at least ambiguous, and that the defendant
 might not unreasonably have considered that his answer to the
 first part was sufficient. In any event, if the fifth interrogatory
 is answered, the plaintiff will, in my opinion, have got all the
 information he can reasonably require.

C. N. K.

Feb. 14, 15. The defendant appealed (1).

Henry K.C. and *Collins* (with them *Healy K.C.*), for the
 appellant:—

The effect of the order made by the Court below is to compel
 the defendant to disclose the names of his witnesses. No such
 order has ever been made in Ireland, and in the one case in
 England in which a defendant was compelled to answer an
 interrogatory similar to No. 5, very special circumstances existed.
 The effect of the cases on the subject is stated in *Halsbury*,
 vol. xi, p. 101, in the following terms:—"As a rule, interrogatories
 as to the name of the author of an alleged libel published by the
 defendant will not be allowed unless his identity is a fact material
 to some particular issue raised in the action, nor as to who supplied
 the information on which the alleged libel is founded, especially
 where there is reason to believe the interrogatory is not put bona

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and
 RONAN and MOLONY L.JJ.

side for the purpose of the action. Neither will interrogatories as to the possession or contents of the original manuscript of the alleged libel be allowed. Most of the cases reported refer to actions against newspapers; but the rule is not limited to this class of action." This rule has been laid down in *M'Colla v. Jones* (1); *Parnell v. Walter* (2); *Hennessey v. Wright* (3); *M'Kenzie v. Steinkopff* (4); *Blanc v. Burrows* (5). Such were the decisions down to *White & Co. v. Credit Reform and Credit Index, Ltd.* (6), in which the interrogatory asking what inquiries the defendants had made as to the truth of the statements complained of before publishing them, and from whom they obtained the information on which they relied in publishing the statements, was allowed. The circumstances of this case were very special, the pecuniary position of the plaintiffs was involved, and the defendants as inquiry agents made profit out of the information they supplied. A communication is not privileged if made through motives of self-interest by those who, for the convenience of a class, trade for profit in the characters of other persons: *Mackintosh v. Dun* (7).

The judgments in the Court below proceeded upon the assumption that in regard to discovery in actions for libel a distinction in principle had been drawn between newspaper and other cases. There is, we submit, no such distinction. It was erroneously supposed that some observations made by Vaughan Williams L.J. in *Plymouth Mutual Co-operative and Industrial Society, Ltd., v. Traders Publishing Association, Ltd.* (8), laid down that the rule as to the inadmissibility of interrogatories asking for the source of information was confined to newspapers; but in *Maas v. Gaslight and Coke Company* (9), at p. 545, he distinctly states that there is no reason for supposing that the refusal of discovery in actions for libel in newspapers went upon any principle not generally applicable. Those cases were only well-marked instances of the principle of refusing discovery because of the oppression it

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(1) 4 T. L. R. 12.

(2) 24 Q. B. D. 441.

(3) 21 Q. B. D. 509.

(4) 6 T. L. R. 141.

(5) 12 T. L. R. 521.

(6) [1905] 1 K. B. 653.

(7) [1908] A. C. 390.

(8) [1906] 1 K. B. 403.

(9) [1911] 2 K. B. 543.

Appeal. would involve. To the same effect is the judgment of Buckley L.J.
 1918. in *Adam v. Fisher* (1). This was not a newspaper case, nor were
 FITZGERALD the following cases upon which we rely:—*M'Colla v. Jones* (2);
 v. *M'Kenzie v. Steinkopff* (3); *Blanc v. Burrows* (4); *Edmondson v.*
 WATSON. *Birch & Co., Ltd.* (5). It may be observed that *M'Kenzie v.*
Steinkopff (3) was decided immediately after *Parnell v. Walter* (6)
 on the same day and by the same Court. Mr. Asquith, who was
 counsel for the plaintiff in both cases, admitted in *M'Kenzie's*
Case (3) that he could not distinguish it from *Parnell v. Walter* (6),
 at least, favourably for the plaintiff, whereupon Wills J. observed,
 "The distinction, if any, is rather the other way."

Serjeant Sullivan (with him *C. Power*), for the respondent:—

In cases where the defence is privileged occasion and bona fide publication, unmixed with any other plea, the defendant may be ordered to answer the interrogatory asking him to give the source of his information, and where, in its discretion, the Court of first instance makes such an order, it is not, as a rule, interfered with on appeal. In *M'Colla's Case* (2) justification as well as privilege was pleaded, and the interrogatories as to the words of the person who had given the information to the defendant were disallowed on the ground that they would be his witnesses in support of the plea of justification. *Adam v. Fisher* (1) dealt with a publication in a newspaper, and the Court gave the defendant the benefit of the newspaper doctrine. In *Edmondson v. Birch & Co., Ltd.* (5), the interrogatory was disallowed because it was not put bona fide, but with the illegitimate motive of bringing an action against another person.

There is no doubt that in respect of interrogatories a line of demarcation has been drawn between the press and the private individual.

Collins, in reply.

Cur. adv. vult.

(1) 110 L. T. R. 537.

(2) 4 T. L. R. 12.

(3) 6 T. L. R. 141.

(4) 12 T. L. R. 521.

(5) [1905] 2 K. B. 523.

(6) 24 Q. B. D. 441.

SIR IGNATIUS J. O'BRIEN C. :—

In this case there is a want of agreement between me and my colleagues, and although in an interlocutory case of this nature it is not of very much importance on what grounds I dissent from their decision, still I think it right to state shortly the reasons for the conclusion at which I have arrived.

There can be no doubt whatever that the making of an order of this kind is discretionary not only in the case of a private individual but also where the defendant is a newspaper. A great deal has been said as to the supposed distinction where discovery is sought between newspaper libels and cases of libels by individuals; and although there are expressions in some of the cases decided in the Court of Appeal in England which, taken simpliciter, might suggest that there is a different rule governing newspaper libels, still I do not think that in reality they bear that interpretation. Speaking generally, where malice is the issue the object of interrogatories is, by discovery of the source of the defamatory matter, to establish, if possible, that neither fair comment nor privilege can be sustained. With regard to the supposed distinctions between newspapers and private individuals it must be borne in mind that a newspaper, a very small one, may be the property of one man who does everything from type-setting to dispatching. Is there any reason for drawing a distinction, so far as discovery is concerned, between a libel in such a newspaper and a libel published by an ordinary individual? There are, of course, newspapers of such high standing and respectable position that I should not attribute to them carelessness in the management or omission of reasonable precautions to prevent the publication of libellous matter. On the other hand, I can imagine a one-man newspaper being well conducted and actuated by the highest motives of patriotism and honesty in what it publishes, while newspapers controlled by wealthy corporations might not be so actuated.

In determining whether or not discovery ought to be allowed, regard must be had to the occasion, the person, and the surrounding circumstances. I am unable, as was Buckley L.J. in *Adam v. Fisher* (1), to understand why there should be anything in the

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Appeal. 1918. shape of a rule of practice making a difference, in this matter, between people owning newspapers and other people. The reported cases in which newspapers were involved are tolerably clear; but FITZGERALD v. WATSON. there are no satisfactory cases touching this question where ordinary persons were the defendants. It is not necessary for me Sir Ignatius J. O'Brien C. to go through the authorities relating to newspapers. All the cases down to 1914 were cited in *Adam v. Fisher* (1), and the effect of them is summed up in the judgment of Buckley L.J. The Court below had in that case refused to allow interrogatories. That decision was affirmed by the Court of Appeal.

There are, it is said, such clear expressions of opinion regarding the distinction between newspapers and other cases, that they are binding upon us. It was thought that by an expression in *Plymouth Mutual Society, Ltd. v. Traders Publishing Association, Ltd.* (2), Vaughan Williams L.J. had made a distinction, and it was, I take it, for the purpose of setting the matter right that he stated in *Maas v. Gaslight & Coke Co.* (3), at p. 545: "There is no reason for supposing that the refusal of discovery in actions for libel in newspapers went upon any principle not generally applicable; those cases are only well-marked instances of the privilege of refusing discovery because of the oppression it would involve." In *Adam v. Fisher* (1), Buckley L.J. says: "In the course of the discussion I asked whether counsel could furnish a reason why the newspapers should be treated in a different manner from other people in this matter, and the only answer I received was that in the case of a newspaper it might be assumed—although I do not know why—that the desire of getting the name of the informant was to enable the plaintiff to sue him—a reason for getting the information which was obviously illegitimate. The only other reason which occurs to me is that a newspaper stands in such a position that it is not desirable on ground of public interest that the name of a newspaper informant should be disclosed. That view is supported by an expression in the judgment of Vaughan Williams L.J., when dealing with the case of a periodical circulating amongst tradesmen, in *Plymouth Mutual Society, Limited, v. Traders Publishing Association, Limited*" (2), Lord Justice Buckley

(1) 110 L. T. R. 537.

(2) [1906] 1 K. B. 403, at p. 416.

(3) [1911] 2 K. B. 543.

goes on to say that Vaughan Williams L.J. would appear to have thought that privilege might be raised in the case of newspapers, because they dealt with matters interesting to a large number of the public, and disclosure of the sources of information ought not to be ordered. "That appears to me," he continues, "to show that, as the respondent in this case is dealing with matters interesting to a large number of the public, and that as the respondent occupies a confidential and responsible position in which it would be his duty to obtain information as to the prospects of candidates for election, therefore one ought to be very careful how one applies the principle of that case to cases such as this." It has been submitted that, in the case of a newspaper, the onus of showing that discovery ought to be allowed is upon the person seeking it, while in other cases the onus is on the person resisting the application. It seems to me there is no such distinction; that no hard and fast rule governing newspapers and other defendants has been laid down, and that in every case the Court must look into the surrounding circumstances. A man occupying the position of a director of a company, and who pledges his oath that he was acting on behalf of his company and in discharge of his duty, is, in my opinion, entitled to as much protection as any newspaper, for it seems to me that the decisions in the newspaper cases, so far as they contain a principle, are applicable to other cases; and I do not think that in considering the present case I ought to disregard what has been laid down in regard to interrogatories of this nature in cases where newspapers were the defendants.

Apart from any question of interfering with the discretion of the Court below, my view is that a different order from that which was made ought to have been made; but it is said that the order of the Court below being discretionary, this Court ought not to interfere unless it is satisfied that the discretion was exercised on a wrong principle. To that proposition I accede, and, as was stated by Buckley L.J., and Phillimore L.J., in *Adam v. Fisher* (1), the test is not whether the Court of Appeal would have exercised the discretion in the same way. In that case the Court of Appeal said they would have made the same order as the Court below if the case had come before them. As I have said, in the present

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(1) 110 L. T. R. 537.

Appeal. case I should be disposed to have made an order different from
 1918. that made by the Court below. Mr. Justice Gordon based his
 FITZGERALD judgment on the ground that the allowance or disallowance of
 v. interrogatories was a matter for the discretion of the Court; Mr.
 WATSON. Justice Pim, in exercising his discretion, held, so far as I under-
 Sir Ignatius J. stand his judgment, that a rule of practice in respect of newspaper
 O'Brien C. libels had grown up under which, in the absence of any special
 reasons to the contrary, the Court would not order the defendants
 to give the names of their informants, and that he ought to apply
 that rule. I do not agree; but, having regard to the judgments
 of my colleagues, my view cannot have any effect.

RONAN L.J.:—

In this case, the defendant wrote and published of and concerning the plaintiff defamatory matter which on the record is admitted to be false; but the defendant says he occupied a position which gave him a right to publish the matter complained of, as he acted honestly and believing the statement to be true. The plaintiff denies that the defendant acted honestly, and alleges that the defendant was animated by personal malice towards him.

We are all agreed that the matter was one for the exercise of its discretion by the Court below. The defence is, that the words complained of by the plaintiff were written without malice and in the belief that they were true, and in such circumstances as to make them privileged. The defendant was asked what foundation he had for the statement he had made concerning the plaintiff and from whom had he obtained the information on which he relied in publishing the matters complained of. [His Lordship reads the answer.] The defendant refused to disclose the names of the persons from whom he had obtained the information on which he relied in publishing the libel. His answer is very carefully drafted, and it is more remarkable for what it omits than for what it says. What it omits is, any suggestion that the information was required for an improper purpose. This omission is remarkable, as in the principal case in which the Court of Appeal in England interfered with the discretion of the Court below, they did so on the express ground that the names of

the parties were not required for the legitimate purpose of proving malice, but for the purpose of bringing actions against them. Appeal.
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In these circumstances, why should not the information be granted? In *White & Co. v. The Credit Reform Association and Credit Index, Limited* (1), a similar interrogatory was allowed by Sir Richard Henn Collins M.R., and Mathew L.J. The Master of the Rolls said:—"If there is to be an investigation into the motives of the person publishing the libel, it is essential to know all the facts; and it is obvious that if the information upon which he acted was procured from a person or persons who could not possibly know anything about the matters in question, and he nevertheless published the statements complained of as if they were based on sufficient information, that might be cogent evidence of malice. To sever the question from whom such information was obtained, from the question whether any and what information was obtained, appears to me quite illogical. I can see no principle on which, or reason why, such a severance should be made." FITZGERALD
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It seems to me that, on the principle of this case, *prima facie* a plaintiff is entitled to the information asked for here if he does not require it for an improper purpose. The appellant has relied on cases of actions against newspapers and trade periodicals. Serjeant Sullivan stated the ordinary English practice in such cases almost in the words in which it has been stated in the Annual Practice during the last ten or twelve years. They are: "In actions against newspapers or trade periodicals, where responsibility for the publication of the alleged libel is admitted, the practice is, in the absence of any special reason to the contrary, to refuse to compel the defendant to disclose the name of the writer of the libel or of his informant." That practice has apparently been followed in the English Courts; but whether right or wrong, we have nothing to say to it here; this is not a case of that class; it is a case between private individuals.

Mr. Justice Pim, in his judgment, says:—"From none of the cases—and they are many—which have been decided on newspaper libels is it quite clear what the reasons were which induced the judges to treat such cases differently from cases of libels by individuals. Serjeant Sullivan, on behalf of the plaintiff, gave

(1) [1905] 1 K. B. 653.

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 ———
 Ronan L.J.

us a very cogent reason for the difference. He said that if a newspaper pleads fair comment, as it always does, the onus is on the defendant, the newspaper, to prove its plea; but if a defendant pleads privilege, the onus is on the plaintiff of proving malice, and if he fails to give evidence of malice, he will be non-suited at the conclusion of his case." Serjeant Sullivan did not suggest here that the onus of proof was not the same in both cases. In both cases the defendant must prove fair comment and privilege. When he has done so, then the burden rests upon the plaintiff of proving malice. Both Mr. Justice Pim and Mr. Justice Gordon treated this case as one to which the newspaper practice had no application; and in the exercise of their discretion they came to the conclusion that the plaintiff was entitled to have the information sought by the interrogatory.

The supposed distinction between fair comment and privilege was brought to an issue by the powerful argument of Mr. Scrutton (now L.J.) in *Thomas v. Bradbury, Agnew, & Co.* (1). He said: "Suppose there are two criticisms of a book by different writers, both couched in similar terms, and each being on its face fair comment, it cannot be said that one exceeds the limits of fair comment because the writer of it is actuated by a malicious feeling towards the author of the book, whereas the other does not exceed the limits of fair comment because the writer of it is not actuated by malice. In neither case is the writer liable." Collins M.R. delivered judgment to the effect that the onus of proof was the same where fair comment and privilege were pleaded. His judgment created a great sensation in the profession; it was discussed in the Law Reviews; and the hope was expressed that the case would be brought to the House of Lords. There was no appeal to the ultimate tribunal, and the decision of the Master of the Rolls has been accepted as establishing the law. Therefore, so far as the burden of proof is concerned, there is no difference between cases where fair comment is pleaded and those in which the plea is one of privilege.

What justification is there for refusing this application? In *Edmondson v. Birch* (2) the King's Bench allowed a similar interrogatory, but the Court of Appeal reversed that decision on the

(1) [1906] 2 K. B. 627, at pp. 632, 633. (2) [1905] 2 K. B. 523.

ground that the object of the plaintiff was to bring actions against the persons on whose information the defendant published the libel.

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Roman L.J.

In this case there may have been some misunderstanding on the part of Mr. Justice Pim as to the burden of proof; but I do not think it affected his judgment in the least as to whether the interrogatory was put with a proper or improper object. There is not a shadow of that suggestion in the judgment of Mr. Justice Gordon; and I see no ground for differing from the views of these two judges. In the cases which came before the Court of Appeal in England the judges emphatically insisted on the importance of not interfering with the discretion of the Court below where it could not be shown that it had acted upon a wrong principle.

For all these reasons I think the judgment of the King's Bench Division should be affirmed.

MOLONY L.J. :—

This is an appeal from an order of the King's Bench Division, dated February 1st, by which the defendant was ordered to give a further and better answer to the fifth interrogatory [reads the interrogatory]. To this interrogatory, and another one, which is not before us, the defendant has made the following answer [reads the answer]. There is no hard and fast rule of practice governing cases in which leave is sought to interrogate as to the name of an author of an alleged libel.

In each case an application for further and better particulars is an application to the discretion of the Court; and we have to consider whether there are sufficient grounds to justify us in interfering with the mode in which that discretion has been exercised by the Court below. Let us see what is in issue. The plaintiff sues for damages for libel. The defendant pleads privilege; and if he succeeds in establishing privilege the plaintiff must fail, unless he gives some evidence of malice. The condition of mind of the defendant is then most material, and this can best be ascertained by finding out from whom and in what manner he made inquiries before he published the defamatory statements complained of. I think that, having regard to the case of

Appeal. *White & Co. v. Credit Reform Association and Credit Index, Ltd.* (1),
 1918. the King's Bench Division was justified in making the order it
 FITZGERALD has made in the present case.

v.
 WATSON. In the case cited the action was brought against a trade pro-
 Molony L.J. tection society, and, just as here, the plaintiff sought to administer
 interrogatories, asking what inquiries the defendants had made
 as to the truth of the statements complained of before publishing
 them, and from whom they obtained the information on which
 they relied in publishing those statements. Collins M.R. states
 correctly, I think, what was, up to then, the result of all the
 cases. At page 658 he says:—"Therefore, it is clear that the
 question being as to the condition of mind of the person publish-
 ing the defamatory statement, the amount of information upon
 which he acted, and the means taken by him to ascertain the
 truth of that statement, are legitimate subjects for interrogation.
 If so, why should one stop there? The issue being as to the
 condition of mind of the defendants when the libel was published,
 and whether they were actuated by malice, an important factor
 would be, not merely what inquiry they made into the truth of
 the statements published, but to whom such inquiry was
 addressed. If there is to be an investigation into the motives
 of the person publishing the libel, it is essential to know all the
 facts; and it is obvious that if the information upon which he
 acted was procured from a person or persons who could not
 possibly know anything about the matters in question, and he
 nevertheless published the statements complained of as if they
 were based on sufficient information, that might be cogent
 evidence of malice. To sever the question from whom such
 information was obtained, from the question whether any and
 what information was obtained, appears to me quite illogical. I
 can see no principle on which, or reason why, such a severance
 should be made." The only qualification since put upon this
 statement of the law is that where it appeared that the real object
 of the interrogatory was to enable the plaintiff to bring an action
 against a person or persons from whom the information was
 derived, the interrogatory should be disallowed: *Edmondson v.*
Birch (2). There are cases, such as *Hennessey v. Wright* (3),
 (1) [1905] 1 K. B. 653, at p. 658. (2) [1905] 2 K. B. 523. (3) 21 Q. B. D. 509.

Hope v. Brash (1), and *Plymouth Mutual Co-operative and Industrial Society v. The Traders Publishing Association* (2), where such an interrogatory has not been allowed, as against newspapers; and this general rule has been extended, apparently by analogy to the newspaper cases, to a case where a large number of the public was interested: *Adam v. Fisher* (3). This is not, however, a newspaper case, or even a case where a large portion of the public is interested. It is a case between individuals relative to a matter which, no doubt, is of interest to the shareholders of the particular company involved, but in no way concerns the general public.

We have been referred to three cases in the Times Law Reports—*M'Colla v. Jones* (4); *MacKenzie v. Steinkopff* (5); and *Blanc v. Burrows* (6)—where similar interrogatories have not been allowed. It seems to me that these cases are clearly distinguishable for reasons which I do not consider it necessary to go into in detail.

On the whole case I am not satisfied that the discretion of the Court below was improperly exercised, and accordingly we have no power to interfere with the order.

Solicitors for the appellants: *Casey, Clay, & Collins*.

Solicitors for the respondent: *Miley & Miley*.

C. L.

(1) [1897] 2 Q. B. 188.

(2) [1906] 1 K. B. 403.

(3) 110 L. T. R. 537.

(4) 4 T. L. R. 12.

(5) 6 T. L. R. 141.

(6) 12 T. L. R. 521.

K. B. Div. MATTHEW M'CUSKER, COMPLAINANT; THOMAS SMITH,
1918. DEFENDANT (1).

Jan. 31.

*Trades Disputes Act, 1906 (6 Edw. 7, c. 47), s. 2—"Peaceful Picketing"—
Meaning of the words "at or near"—Right to enter on private property—
Onus of proof—Motives unconnected with dispute—Justices—Conviction.*

An unlawful entry on another's premises cannot be justified under sect. 2, sub-s. 1, of the Trades Disputes Act.

(Per Sir James Campbell C.J. and Kenny J.) Acts done during an existing trade dispute may in reality be dictated by political or personal motives so as to lose the protection of that section.

Larkin v. Belfast Harbour Commissioners, [1908] 2 I. R. 214, followed.

CASE STATED by the justices at Belfast Petty Sessions before whom the defendant, Thomas Smith, was on the 16th November, 1917, convicted and fined £5 on a summons charging that he the defendant with a view to compel the complainant to abstain from an act which the complainant had a legal right to do, to wit, to perform his lawful contract of employment with his barman, Thomas Ferguson, did, on the 27th October, 1917, at Belfast, wrongfully and without legal authority beset a place where the complainant carries on his business, namely his licensed premises at 35 and 37 Queen's Square, Belfast, and the approaches to such place.

The main question raised by the case was whether the acts of the defendant done in the neighbourhood of and in the hall of the complainant's licensed premises were protected by sect. 2, sub-s. 1, of the Trades Disputes Act, 1906, as being done in furtherance of a trade dispute within the meaning of the Act. The case set out the evidence as follows:—

Thomas Ferguson.—“I am a barman in the employment of Mathew M'Cusker in the Queen's Square premises. I was, but I am not now, a member of the Barman's Trade Union. I was on strike about the first week in July. I then resumed work with Mr. M'Cusker, and have been working there ever since. On

(1) Before SIR JAMES CAMPBELL C.J., and GIBSON and KENNY JJ.

Saturday, the 27th October last, I was on the premises about 4.30 o'clock in the afternoon. A customer came into the shop. The defendant, Thomas Smith, followed him in. I knew Smith by seeing him. He was a barman on strike at that time. He was employed next door by Mr. John Crealey. He was watching the premises that day with other men. He kept in front of the premises from 12.30 till 9.30 that night. That was the closing hour. When Smith came after this customer he came inside the premises about two feet. He got the customer by the shoulder and turned him forcibly round. He said to him: 'Do not go in there; there is a strike on; there is nothing but scabs and black-legs work there.' He said: 'Go to Mr. John Crealey's next door.' During that conversation he had a grip of the customer. He had a grip of him for about two minutes. After about two minutes he came on in. The customer told Smith he should not interfere. Smith then left the premises. Mr. M'Cusker met Smith at the door. He said to Smith: 'What business have you in there?' I did not hear what Smith said in reply. Some time before this I saw Smith follow up a lady and gentleman into the shop. That was the same day, about ten minutes before. He gripped that gentleman by the arm and said there was a strike on in there, and that no one but scabs and blacklegs worked there. He gripped him forcibly by the arm and pulled him round. That was inside the premises. I was not there all that day, but only at the time mentioned. I saw Smith step between people going into Mr. M'Cusker's shop. That was on the street. Some of them turned away."

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Cross-examined by Mr. J. Graham, Solicitor.—"I had been a member of the Barmen's Trade Union. I have not got my membership card, and cannot say where it is. I am not a member now. I ceased to be a member four months ago. I was out on strike from Sunday until Monday night. I then went back to my employment. There was no special persuasion used to get me back. There are two entrances, both leading to the bar. This particular door into which Smith followed the man was the one nearer to the docks. Beside that door there is a door leading upstairs, and you have to turn to the right into the bar. There is a kind of hall. I do not allege that Smith came into the bar. He came into the

K. B. Div: hall. I can see from the bar into the street. This occurred on
 1918. Saturday, the 27th October, 1917. Saturday is our busiest day.
M'CUSKER From one o'clock till two o'clock is the busiest time. We are not
v. so busy on Saturday afternoon. I do not know the name of the
SMITH. man who Smith followed. The man went into the bar and was
 not interfered with. There were leaflets being distributed. The
 customer mentioned got a leaflet when he was two feet inside the
 door. I cannot say whether Smith went hurriedly forward to the
 man. I saw him stop the man two feet inside the doorway. I
 saw him catch the man by the right shoulder. He put his hand
 on his shoulder. He did not put his hand on the man's shoulder
 to attract his attention. He pulled him round forcibly. The bar-
 men in Mr. M'Cusker's were out on strike in July, but are now
 back again. All his employees stayed out then just from Sunday
 morning till Monday night. The reason we went on strike was
 because we were locked in the society rooms. We were locked in
 from 11 o'clock on a Sunday morning until 3.30 o'clock the same
 evening. We had to agree to the strike because we could not get
 out. The reason I did not go back to my work at 3.30 was because
 I may not have wanted to go back. I went on strike for fun. We
 had no grievance at all. There were twelve employees went out
 on strike along with me for fun. Mr. M'Cusker issued a leaflet
 produced in reply to the barmen's leaflet. The leaflet Mr. M'Cusker
 issued contains the words: 'Sinn Fein Shopmen in Revolt.' I
 saw Smith speak to two people only. I do not know who the
 second man was. I am not a blackleg. John Crealey is a publican
 next door to Mr. M'Cusker. I cannot say whether or not he has
 raised the wages of his barmen. Miss Quinn is another publican.
 Neither Crealey or Quinn employed blacklegs. No one has ever
 interfered with me in any way."

John M'Cusker.—"I am a son of Matthew M'Cusker. On
 Saturday, the 27th October, 1917, I was employed in my father's
 shop. I saw defendant interfere with a customer. That was
 about 4.30 p.m. He caught him by the shoulder and turned him
 round and gave him a leaflet. He told him not to go in there
 because there were nothing but scabs and blacklegs in there. He
 held the man for two or three minutes about two feet in the
 doorway. Both were inside the premises. I saw him interfere with

a lady and gentleman only half an hour before that. He got that gentleman also by the shoulder and held him for about two or three minutes. I was on the street at that time giving out leaflets. He said to the man: 'You should not go in there as there is nothing in there but scabs and blacklegs.' During other parts of the day he got before other people and the shop. That was on the street. He turned away a good many."

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Cross-examined by Mr. Nathaniel Tughan, Solicitor.—"I was employed by my father to distribute leaflets opposite his door. I gave them to people passing by. Customers of Miss Quinn and Mr. Crealey got them. One of the leaflets was headed: 'Sinn Fein Shopmen in Revolt.' I never forced a leaflet on anyone. These other men were just doing the same thing as I was. I was on the street from about 1.15 o'clock till 9.30 o'clock. I was all that time giving out these leaflets. When Smith would give a leaflet to a customer then I would give him one of ours. I shouted: 'There is no strike here,' and they shouted: 'There is a strike here.' Some of the persons to whom I offered bills would not take them, and I did not force them. The doorway mentioned is covered up at night by a little iron rail. The two doors are swing doors and are kept closed. There is embossed glass on them. I should have a better view from the outside than from the inside. No person interfered with me. Our message boy was also giving out hand-bills. We were not instructed to say that there was no strike on. We just said that of our own accord. We said nothing else. We did not say anything about Sinn Feiners. That was on the bill. Ferguson was out all day on the Sunday of the strike. The others were out also. My brother and father and myself carried on the business that day. All the boys were boarded in, and that was the cause of the trouble. The men walked up and down in front of the premises as far as Prince's Street at Crealey's. It was the custom if a man was seen going along to hurry up to him and give him a bill. They might pull him round to give him the bill. I made sure that everyone got one of my bills."

Matthew M'Cusker.—"I am the owner of the licensed premises bearing my name in Queen's Square, Belfast. I have six other shops. There was no strike in my premises at the date of this charge. Some of my men were out for a day or so in July. I do

K. B. Div. not think that makes a strike. There was no justification for besetting my house. My men were perfectly satisfied. My house
 1918. has been beset by the defendant and others since. There were
M'CUSKER usually seven or eight of them parading in front of the premises.
v. There were also three policemen and an acting sergeant. I had
SMITH. to issue some bills in my own defence. The red poster stating that there is no strike in my premises is actually displayed in my window. The efforts of these men seem to be all directed against me. Ferguson has been in my employment for two and a half years. About 4.15, on the evening of the 27th October, 1917, I was coming down Queen's Square when I saw defendant follow a customer into the shop. I got hold of him in the door as he was coming out. I told him he had no business in there. I called a policeman, and got his name and address."

Cross-examined by Mr. Tughan, solicitor.—"My employees went out on the Sunday in July mentioned, and did not come in all day. I have heard Ferguson say that he was released at 3.30. He did not return to work between that time and five o'clock. He came back on Monday night. I locked the barmen out that night, and would not allow them to sleep on the premises. Not one of them was in that evening. I issued the bill produced which states, 'Easter Week in July: Sinn Fein Shopmen in Revolt: None Employed Here.' None of my men asked to be boarded out. My men did not distribute bills at other premises. I did not know that they went down as far as Prince's Street. They kept at my own shop. I got other men to distribute the bills."

William Murray.—"I am seventeen years of age. I work in Mr. M'Cusker's shop. I am a shop and store worker. I saw defendant Smith go into the shop after a customer and heard him say that there was a strike on, and nothing but scabs and blacklegs worked in there. He pulled the man round by the shoulder. That was on Saturday, the 27th October, 1917, about 4.30 p.m. That was inside the shop. Some time earlier he said to a gentleman who was going in with a lady not to go in there, and pulled him round by the shoulder. He held him for about three minutes. He also told a soldier not to go in there as there was a strike on. He did not do anything to the soldier. I saw him go between

customers who were going into Mr. M'Cusker's shop. He succeeded in turning about six of them away." *K. B. Div.*
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Cross-examined by Mr. J. Graham, solicitor.—“I am a shop and store worker, and was out delivering bills. I gave them to anyone who would take them; I delivered Mr. M'Cusker's bills just the same as defendant Smith delivered his bills. . . .”

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No evidence was offered on behalf of the defendant.

[Having set out the contentions of counsel for the complainant, and of the solicitor for the defendant, who contended that there was no evidence of the complainant's being compelled to break any contract or of his premises being beset, and that the defendant's acts were protected by the Trades Disputes Act, 1906, the case continued:—]

“And whereas, upon the said hearing being satisfied upon the evidence, and finding as a fact that the defendant with a view to compel the complainant to abstain from doing an act which he had a legal right to do, to wit, to perform his lawful contract of employment with Thomas Ferguson, his barman, did, on the day referred to, wrongfully and without legal authority beset a place where the complainant carried on his business and the approach to such place: that the defendant was not acting in contemplation or furtherance of a trade dispute, and did not attend at or near the complainant's place of business merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from work, we convicted the defendant and imposed a penalty as aforesaid.”

T. Brown and D. M. Wilson K.C., for the appellant:—

There is no question of evidence in the present case. There was nothing which could be called “besetting” under the original action. “Besetting” must imply continuous action. Mere parading in front of a house is not “besetting.” The appellant attended for the purpose of communicating information in furtherance of a trade dispute within the meaning of sect. 2, sub-s. 1, of the Trades Disputes Act, 1906 (6 Edw. 7. c. 47).

[SIR JAMES CAMPBELL C.J.: Here they followed the customer into the shop. They might have done all this legitimately if they had not gone into the premises.]

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He only went two feet into the hall. Mere stepping into the premises to give a handbill is not sufficient to deprive him of the protection of the Trades Disputes Act, 1906. The finding of the magistrates is vitiated by their finding that what was done was not done in pursuance of a trade dispute.

T. J. Campbell and Carrigan K.C., for the complainant:—

"Besetting" is stationing oneself outside a house with hostile intention. The facts support the finding in the present case. There was evidence that this was not peaceful picketing. All watching and "besetting" is unlawful, except that which comes within the exceptions of the Act: *Lyons v. Wilkins* (1). "Besetting" does not necessarily imply any lengthened watching: *Charnock v. Court* (2). In this case the watching extended over ten hours. The object was to force M'Cusker to break his contract with his employee Ferguson. "Attending" indicates an action of shorter duration than "watching": *R. v. Wall* (3). The defendant had no right to enter on private property: *Larkin v. Belfast Harbour Commissioners* (4).

D. M. Wilson K.C., in reply:—

The magistrates formed the erroneous impression that no trade dispute existed because there was no dispute between M'Cusker and his employees. This was a fundamental mistake: sect. 5, sub-s. 3, of the Trades Disputes Act, 1906; *Dallimore v. Williams and Jesson* (5). If, acting in furtherance of a trade dispute, the defendant told the people to go to a rival publican, he was protected in doing so even though he had a malicious motive. The three entries upon the complainant's premises deposed to do not amount to "besetting" in law. The true legal view of the facts was never before the magistrates. Their finding is ambiguous, as it may mean either that the acts were not done in furtherance of an existing trade dispute, or that there was no trade dispute at all.

(1) [1899] 1 Ch. 255.

(2) [1899] 2 Ch. 35.

(3) 21 Cox, 401, per Palles C.B.

(4) [1908] 2 I. R. 214.

(5) 29 T. L. R. 67;

30 T. L. R. 432.

SIR JAMES CAMPBELL C.J.:—

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We cannot interfere with the decision of the magistrates in this case. It is a case stated, and we are bound by the magistrates' findings of fact. Unless it appears from the case itself that the magistrates acted without evidence, or that their decision was wrong in point of law, we have no jurisdiction to interfere. A summons was brought at Petty Sessions against Thomas Smith for besetting the premises of the complainant with a view to compel the complainant to cease to employ his barman Ferguson. The occurrence took place on October 27th. It appears there had been a strike in July by the barmen against the publicans as to terms of employment. The complainant's barman Ferguson was for a short time on strike, and was a member of the barmen's union, but he went back to his employment. It is alleged that this strike continued, and existed, on October 27th. On that day the plaintiff's premises were picketed by a body of men, including the defendant, from 12.30 to 9.30 p.m. On three occasions during that period the defendant actually interfered with people in the hall of the complainant's premises who had not yet entered the bar. He stopped them in the hall, and informed them that there was a strike on, and told them there were "scabs" in M'Cusker's, and they ought to come in next door. That evidence was given in detail by three witnesses, and the case for the complainant then closed. Mr. T. J. Campbell then submitted that the evidence sustained the conviction, that even if he were acting in pursuance of a trade dispute, the acts of violence deprived him of the protection of the statute. No evidence was called for the defence to show what was the nature of the strike or even that there was an existing strike on the date in question, or how the pamphlet warfare had arisen. We have seen M'Cusker's leaflets, but we have not seen the leaflets on the other side. Having regard to the tone of M'Cusker's leaflets, they afforded evidence to the magistrates which would enable them to find that the controversy had a political aspect, and had no reference to any trade dispute. The magistrates overruled the contention of the solicitor for the defence. [His Lordship referred to the case.]

The magistrates by using the word "merely" in their finding show that the defendant had a real object and motive in being there

K. B. Div. . apart from that covered by the Trades Disputes Act. They may
 1918. have come to the conclusion that he was there in Crealey's interest.
M'CUSKER There was evidence to justify them in so finding. In view of the
v. leaflets and the efforts to induce M'Cusker's customers to come
SMITH. next door, that would not have been an unreasonable conclusion.
Sir James Otherwise, it is hard to see why this man is found outside the
Campbell C.J. door of his former employer, with whom he had no quarrel,
 soliciting customers to enter Crealey's shop. They may have con-
 cluded that his substantial motive was to further Crealey's interest.
 It is said there clearly was a trade dispute, and that the magis-
 trates may have drawn the conclusion that there was none. At
 first I thought the evidence was conclusive as to the existence of a
 trade dispute, but on further consideration I think there is
 danger of confusion. The fact that there was a strike in Belfast
 in this trade some months before does not necessarily bring such
 a strike into relation with this dispute. The magistrates may have
 thought the parties were not acting in furtherance of this or any
 trade dispute. Even assuming that there was at the time a trade
 dispute in Belfast, the defendant would still be outside of the
 statute if his acts were not done in furtherance of it. I agree that
 the finding may mean either that there was no trade dispute, or
 that what was done was not done in furtherance of it. There is
 substantial evidence to support the latter construction; and in my
 view we are bound to adopt the construction of the magistrates'
 words which will support their decision. We cannot be influenced
 by the suggestion that the contrary would appear from a news-
 paper report. But I do not say that the magistrates could not find
 that there was no trade dispute. They may have thought that
 the acts were really done in furtherance of a political or personal
 dispute.

Again, "at or near" does not include entering on the premises
 of the complainant. This Court has already decided in *Larkin's*
Case (1) that "at or near" must be construed so as to exclude the
 premises themselves. "At" does not mean "in" or "upon."
 This being settled law, there was evidence that some acts of the
 defendant were committed in or upon the premises, and therefore
 he could not justify his conduct under the section.

(1) [1908] 2 I. R. 214.

GIBSON J. :—

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The defendant could not escape a conviction in this case. In two respects he lost the protection of the Trade Disputes Act: 1, he invaded the complainant's premises; 2, the statute says that, even if he does attend at or near the premises, it must be merely for the purpose of peacefully obtaining or communicating information. In this case he held back customers by force. My difficulty is as to the view of the Justices on the question of trade dispute. I find it impossible to think that Mr. Campbell, for the complainant, relied on the contention that the man was a tout for the rival publican. The finding that "the act was not done in furtherance of a trade dispute" is ambiguous. It may mean either that there was no trade dispute, or that there was such a dispute, but that the defendant was not acting in furtherance of it. As to what constitutes a trade dispute, this is a question as to which distinguished lawyers, like Ridley J. and Darling J., have taken what is decided to have been an erroneous and too narrow view, and the magistrates in the present case may have, in like manner, thought such dispute must be one between an employer and his staff. As there is ambiguity in the finding, the Court would require to have the ambiguity removed if it could have affected the result. There is no presumption in this Court that a conviction is right. I do not, however, dissent from the conclusion of my Lord, because, in my opinion, on the facts the defendant was rightly convicted. He was clearly not within the protection of the Act. The prosecution is founded on his conduct inside the complainant's premises. If the magistrates thought there was a dispute, that would not have affected their order. If the conclusion that there was no trade dispute was or could properly have been the basis of their decision, I should think the case ought to be sent back to have the matter distinctly found.

KENNY J. :—

I concur with the Lord Chief Justice, and I see no reason for sending the case back.

Solicitor for the appellant: *John Graham.*Solicitors for the complainant: *Donnelly & Co.*

A. E. C.

K. B. Div.

1918.

April 17.

CARLISLE v. ORR, No. 2.

(1917. No. 2999.)

Practice—Felony—Assault—Civil action—Failure to prosecute—State of Proceedings—Judicial discretion—Excuse for not prosecuting—Prosecution after verdict.

The rule that where a plaintiff sues in respect of a wrong which is a tort and also a felony, the defendant should be prosecuted in respect of the felony before the civil action is heard, does not make such criminal prosecution an indispensable condition precedent to the right to maintain the civil action. In its modern application the rule is merely suspensory of the civil rights, and is subject to the exercise of judicial discretion. In exercising such discretion the Court may consider circumstances, such as the infancy, ignorance, or poverty of the plaintiff, which may afford excuse for the failure to prosecute in respect of the felony. Where the plaintiff has obtained a verdict in the civil action, the Court, on motion for a new trial or for judgment, may consider the circumstance that between verdict and motion the defendant has been prosecuted in respect of the felony.

Wells v. Abrahams, L. R. 7 Q. B. 554, followed.

MOTION FOR JUDGMENT.

Motion by the plaintiff for judgment on the verdict and findings of the jury and cross-motion by the defendant for judgment or for a new trial of the action.

The action was originally brought by the plaintiff by her next friend, her father, against the defendant for assault, and having carnal knowledge of her against her will. The statement of claim alleged that on the 15th July, 1912, at 7 Crumlin Road, Belfast, the defendant assaulted the plaintiff, then a girl under sixteen years of age, and had carnal knowledge of her. The defendant having entered an appearance to the writ in the action and asked for a statement of claim, moved to set aside the writ and statement of claim in the action on the ground that the defendant was not a minor, that she was not under age at the time when the alleged assault took place, and that the cause of complaint, if any, had been settled by the receipt by the plaintiff's father from the defendant of the sum of £50 in settlement.

(1) Before GIBSON, MADDEN, and KENNY JJ.

This motion was argued before the King's Bench Division and afterwards in the Court of Appeal, and is reported in [1917] 2 I. R., p. 534. The Court of Appeal amended the statement of claim by striking out the next friend and the reference to the plaintiff's age, but did not decide whether the action could be continued without previous prosecution of the defendant criminally for the felonious tort alleged: The defendant by his defence traversed the assault and rape and pleaded leave and licence.

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The action was tried before Gordon J. and a special jury of the city of Dublin on the 14th and 15th February, 1918. The plaintiff was examined and deposed to the assault and rape. She was cross-examined as to her mode of life and as to the alleged settlement with her father. At the close of plaintiff's case, Mr. Healy K.C., for the defendant, asked the judge to direct in the defendant's favour, or to grant an order suspending further proceedings on the ground that the plaintiff's cause of action was in respect of a felonious tort for which the defendant had not been prosecuted before action brought. The judge refused to direct or to make the order sought, and no evidence was called for the defendant. At the close of the case the following questions were submitted to the jury:—1. Did the defendant, on the 15th July, 1912, assault the plaintiff by throwing her on the floor against her will? 2. Did the defendant assault the plaintiff by having carnal connexion with her against her will? 3. If you answer question 1 in the affirmative, assess damages for that; if you answer 2 in the affirmative, assess damages for that. The jury found in the affirmative to both questions 1 and 2, and assessed damages as follows:—on No. 1, £25; on No. 2, £100. The issue paper was signed in blank by the foreman, and the judge left both parties to move for judgment.

The defendant's motion, for a new trial, was based upon the following grounds:—That the verdict was against the weight of evidence; that the judge at the trial should have withdrawn the case on the ground that the tort charged was a criminal offence, and that the defendant should have been prosecuted criminally before action brought, and that the two sums of damages found were cumulative and oppressive.

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Henry Hanna K.C. (with him *Williamson K.C.* and *Lowry*), for the plaintiff:—

The only question here is whether the failure to prosecute criminally before action was a bar to the plaintiff's action. The argument in favour of such bar rests upon a rule which is now obsolete, since the reason for that rule—namely, forfeiture consequent on conviction for felony—no longer exists, and damages recovered by the plaintiff cannot now interfere with the right of the Crown to the goods of the convicted felon. Again, if the rule is not obsolete, its only effect is to suspend the civil proceedings: prosecution is not a condition precedent. Even if it were a condition precedent, suspension is a matter within the discretion of the Court, and the Court can refuse to suspend the civil action where there is reasonable excuse for the failure to prosecute criminally. The point is not one which the defendant can raise in defence or in bar; it is a point to be made by the Court before which the civil action is brought: *Smith v. Selwyn* (1); *A. v. B.* (2). Here there were excuses for the failure to prosecute, namely, the infancy and poverty of the plaintiff, and public policy or interest did not require the prosecution of the defendant years after the offence. In any event the prosecution could not have succeeded; in fact, since the action informations were refused by the magistrates, and the Grand Jury threw out the bill of indictment against the defendant. This Court, on the authority of *Wells v. Abrahams* (3), can take cognizance of these subsequent fruitless attempts to prosecute.

Orr, in person.

GIBSON J. delivered the judgment of the Court as follows:—

The motions before us for judgment or a new trial bring before the Court questions discussed in the motion to stay proceedings, reported [1917] 2 Ir. R. 534–540, where such motion was refused, the matter being left to be dealt with at the trial on the evidence there given. In its original form the action was by the plaintiff as an infant, with her father as next friend, and the statement of claim charged the defendant with assault and carnal knowledge, which must have taken place when the plaintiff was under the age of sixteen years, so that the pleading might have

(1) [1914] 3 K. B. 98. (2) 24 L. R. Ir. 235. (3) L. R. 7 Q. B. 554.

been construed as averring a statutory misdemeanour under *K. B. Div.* Stead's Act, as well as rape. It was ambiguous. 1918.

It appeared afterwards that the plaintiff was of age when the action was brought, and that she was somewhat over sixteen years of age when the assault was committed. The defendant moved to set aside all the proceedings, the motion being founded on the misrepresentation as to her age when the action began, and on the fact that her father had, several years ago, taken £50 in settlement of the wrong. The motion was refused, as the defendant had, with full knowledge of the facts, entered an appearance in the ordinary way; but the Court ordered that the father, as next friend, should be struck out, and that the reference to the plaintiff's age in the pleading should be deleted.

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Gibson J.

At the trial on the amended pleading, before Gordon J. and a special jury, the plaintiff was examined, and severely cross-examined by Mr. Healy as to her moral character and mode of life. Her evidence, if true, proved that she was thrown down and raped. At the close of the plaintiff's case Mr. Healy K.C. asked for a direction or an order that the suit should be suspended till a prosecution for the felony should have been brought. The judge declined so to rule. Mr. Healy called no evidence—a course with which the defendant, who has conducted his case before us in person, appears to be dissatisfied; but his experienced counsel doubtless considered that it was not desirable to put the defendant in the box. At the request of plaintiff's counsel the judge put two questions to the jury, the first as to the preliminary assault (on which the jury awarded £25 damages), and the second as to the actual rape (on which £100 damages were assessed). It is obviously difficult to put the various stages of the rape into separate compartments, and Mr. Hanna abandoned the £25 damages.

The trial presents, for the first time since *Wells v. Abrahams* (1), the question, under what conditions a trial may be allowed to proceed in respect of a cause of action founded on felony, notwithstanding that there has been no prosecution. In the King's Bench judgments on the motion the matter was, to some extent, discussed; but the Court of Appeal only decided that suspension

(1) L. R. 7 Q. B. 554.

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or not was most proper for the discretion and decision of the judge at the trial. Where a prosecution is impossible by reason of death or absence from the jurisdiction the civil remedy would not be affected. Law does not compel impossibilities. The topics here which might be relied on as influencing discretion, if the rule in its present form, which is suspensory only, permits discretion, appear to be infancy, delay—accounted for by poverty and ignorance of legal rights and forms—the acceptance of £50 by the father, and the probability, if not certainty, that a prosecution would fail. Since the trial it appears that such prosecution was brought before the justices, who refused to return informations; and the grand jury afterwards found “no bill.” If we are at liberty to consider that result as now relevant, the defendant has been found civilly guilty of felonious assault, with £100 damages, for which, criminally, he has been held not to be answerable.

Infancy, treated as a material circumstance in the judgments below in [1917] 2 Ir. 554, was expressly excluded as matter of excuse by the Master of the Rolls on appeal, but Ronan and Molony L.JJ., did not indicate agreement with that opinion, so that we are free to act on our own view. If the rule to-day rests at all on default in performance of civic duty, it would seem startling that a friendless pauper child of six or seven years of age, or a half-witted creature, got with child by felonious intercourse, where civil remedy might be barred by lapse of time or lost by death, the action being personal, should be obliged to prosecute. Young people selling matches like the plaintiff to earn a livelihood have no next friends willing to act. Poverty, ignorance of legal rights and forms, and infancy combined may excuse delay and failure to prosecute. Here the circumstances, lapse of time, acceptance of money by the father, would make likelihood of effective prosecution out of the question. In Ireland such a crime as rape is always dealt with by the Law Officer; it is never left to private prosecution; and no such public prosecution would be directed, having regard to the facts and dates.

If the administration of the rule is now a matter of judicial discretion, can the Court take into account the private prosecution attempted after the trial? We must bear in mind that, as regards

the performance of duty to the State, public policy, and disability to compromise, there is no difference between a criminal misdemeanour, such as that under the statute of 1885, and rape proper. The special reasons confining the rule to rape, as explained in [1917] 2 Ir. 554, are now more or less obsolete, though the rule, no longer enforced by non-suit, as in the Irish cases noted in *Wells v. Abrahams* (1), still lives on. With some doubt, I think that such prosecution (which if before the trial would have removed any objection) may be considered on this motion; as a second trial when the objection would not exist would seem unnecessary. At the same time I should have been better pleased if the failure of the prosecution had preceded the trial. There is, however, no application as to damages having been wrongly assessed or excessive.

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We must affirm the ruling of our brother Gordon. Judgment will be entered with costs for £100, the other head of damages having been abandoned.

Solicitor for the plaintiff: *T. Erskine Alexander*.

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(1) L. R. 7 Q. B., at p. 565.

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IN RE CARR, A BANKRUPT.

May 3, 10. *Licensed premises—Charge on Licence—Rights to receive beer—Output of Beer (Restriction) Act, 1916 (6 & 7 Geo. 5, c. 26), sect. 5.*

Licence-holders have, under section 5 of the Output of Beer (Restriction) Act, 1916, certain rights to obtain beer. A licence-holder who became bankrupt had rights under the said section. These rights were from time to time sold by the assignees in bankruptcy, and the proceeds brought into the bankruptcy matter. Chargeants, whose charges were well charged on the licence and licensed premises, having claimed that their charges were also well charged on the proceeds of the sale of these rights:

Held, that the charges did not extend to such proceeds, but

Seemle, on a sale of the licence and licensed premises, the charges extend to the proceeds of the sale of rights accruing subsequent to the sale of the licensed premises.

APPLICATION for a declaration of charge.

By his will, dated the 21st February, 1911, Michael Carr, licensed publican, left all his interest in his licensed house and premises at Mulhuddert, together with the licence, to his son, Frank Carr, together with two sums of £100, in favour of his daughters, Kathleen Carr and Anastasia Carr, respectively. Michael Carr died on the 26th May, 1912, and probate of his will was granted on the 2nd July, 1912, to George Carr, one of the executors. Frank Carr continued to carry on the business after his father's death, and became a bankrupt in the year 1917. No part of the two charges of £100 had been paid to either of the bankrupt's sisters. The bankrupt having ceased to carry on his business as licensed publican, his rights under sect. 5 of the Output of Beer (Restriction) Act, 1916, were from time to time sold by his assignees in bankruptcy, and the proceeds were brought to the credit of the bankrupt's estate. An order was made in the bankruptcy matter for a sale of the licensed premises.

The applicants, Kathleen Carr and Anastasia Carr, now applied for an order declaring their two charges of £100 each well charged on the proceeds before mentioned.

Newett, for Kathleen Carr and Anastasia Carr:—

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Our contention is that the charge of £100, created by the will of Michael Carr in favour of his two daughters, extends over the sums received for the sale of the porter rights as being attached to or part of the licence or good-will of the business. The effect of sect. 5 of the Act of 1916 (6 & 7 Geo. 5, c. 26) is that the licence-holder has a vested right to get beer or porter; and this right is an integral part of the licence. Our charge is on the public-house and licence, with all the rights attached thereto, that is to say, on the business as a going concern. It is illusory to say that the charge on the licence is unaffected when the only benefit that the licence confers is to be taken away. It is like the case of a bond with coupons attached. The bond is left and all the coupons are taken away in advance. The charge in the will is on "all my interest in the licensed premises and licence," which means a charge on them as a going concern. The privileges are given to the licence-holder as attaching to the licence, and a mortgagee is entitled to them as an accretion: *In re O'Brien* (1).

A. F. Blood K.C., for the assignees in bankruptcy, opposed the motion only so far as it sought to fasten the charge of the legacies on the "porter privileges." This is an attempt to extend the doctrine of *O'Brien's Case* (1); but all that case decides is that a mortgage, by way of equitable deposit of a lease of licensed premises, attaches also to the licence itself as part of the "good-will." It is now contended that the legacies here, which are charged by the will on the licensed house and licence, extend also to the "porter privileges." The testator died in 1912, and the applicants' charges became operative on the death, but no "porter privileges" existed till 1916, when they were created by special war legislation. It is clear that the charges do not extend to the stock-in-trade, and these "porter privileges" are in reality potential stock-in-trade, which the assignees are entitled to realize as they become available for the benefit of the creditors generally. There has already been a sale of the "porter privileges" for the statutory quarter, which is now completed. The last sale of them by the assignees was held on the 3rd of April for the "privileges" up to

K. B. Div. the end of that month; and the notice of motion is dated the 1918. 24th April. As to the month of May, the privileges are now in *in re CARR.* existence and undisposed of. By the Output of Beer (Restriction) Act and the rules made thereunder these "porter privileges" are divided into quarterly periods. The will, in creating the charge of the legacies, does not use such words as "going concern," nor does it declare any charge on the trade or stock-in-trade or on the profits. The Act carefully and designedly uses the expression "licence-holder" as being the person entitled to these porter rights, and the assignees step into the shoes of the "licence-holder," in this case the bankrupt, and are entitled to all his rights in the stock-in trade.

[Counsel referred also to *Kelly v. Montague* (1) and to the Manual of Emergency Legislation, revised to May 31st, 1917, at p. 291, where the rules made under the Act are set forth.]

May 10.

PIM J. (after referring to the facts as above) continued:—

It will be noted that the two sums of £100 are charged not only on the licensed premises, but on the licence, and it seems to me to follow from that, that the chargeants would be entitled to insist on the licence being kept up, so that, if at any time the premises had to be sold for payment of their charges, the licence could be duly transferred to the assignee of the premises. They have, however, no charge either on the stock-in-trade or on the money in the concern, or upon anything except the licensed premises and the licence.

In the year 1916 an Act of Parliament was passed (6 & 7 Geo. 5, c. 26) called "The Output of Beer Restriction Act, 1916." The object of this Act, which was a war measure, was to control and limit the output of beer. Brewers were not entitled to brew more than a certain standard barrelage, and it became necessary to deal with licence-holders and to fix what each of them in the future should be entitled to obtain.

By sect. 5 it was enacted that each licence-holder should be entitled to obtain, from the brewer or* brewers with whom he had been dealing, a certificate stating the total number of standard barrels represented by the beer supplied during each quarter of

(1) 29 L. R. Ir. 429.

the year ending the 31st day of March, 1916, or such shorter period as the supply had continued. Having obtained this certificate, the licence-holder could obtain, either from the brewer with whom he had been dealing, or from any other brewer, the amount set out in the certificate for each future quarter, but less by 15 per cent. He could obtain no more, and he could only obtain that amount during the quarter to which it had reference. This right to receive a limited amount of beer has, whatever doubt there may be as to whether in law it was transferable or not, in fact often been transferred, and in this Court these rights have in several cases been put up for sale and sold. What is sold is the right to receive for a month or a quarter, as the case may be, the ascertained and certified supply of beer, and there has neither been nor could there well be a sale and transfer of all the future rights of the licence-holder. It is a necessary thing that such sales should be made, for if they were not made the beer would be, so far as the licence-holder was concerned, simply lost.

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In this case, the bankrupt having for some time ceased to carry on his business, the rights to receive the beer have been sold by the assignee, and the money has been brought to the credit of the bankrupt's estate. Counsel on behalf of the two chargeants now appears and contends that the charge extends over the moneys received for the sale of these rights, on the ground that, in some way or other, it is part of the goodwill of the business and would be caught by the charge on the licence.

Now, it is perfectly clear that the chargeants were given no charge on the stock-in-trade, that is on the beer itself, and if there had been no war, and no Output of Beer Restriction Act of 1916, these chargeants would have had no claim to interfere with their brother, no matter what he might have done with his beer, unless he acted in such a way as to put the licence in peril. If that be so, how can they now suggest that they have a charge on moneys which represent the beer over which they had no charge? Or how can they suggest that their rights as chargeants are being in any way interfered with? They are entitled to have a declaration that the amounts due to them respectively are well charged on the premises and on the licence, and to an order for the sale of the premises. I certainly would be prepared to hold that, if any

K. B. Div. of the rights which accrued to the licence-holder after the date of
 1918. sale were sold by the assignee, the chargeants' security extended
In re CARR. over the proceeds, inasmuch as the sale of such rights would
 Pim J. interfere with the value of the licence. I cannot, however, see
 how the chargeants are injured by a sale of the rights which took
 place before the sale of the premises. Such sale of rights could
 in no way affect the value of the licence.

The chargeants have asked in the alternative for a sale of the premises. An order for sale has already been made. If they so desire, I will declare their charges well charged on the premises and on the licence, and the sale of the premises and licence will be had as soon as possible. The applicants are entitled to their costs along with their demand.

Solicitors for chargeants: *W. J. Shannon & Co.*

Solicitors for the assignees in bankruptcy: *Keating & Keating.*

D. M. S.

K. B. Div. R. (O'CONNOR) v. THE JUSTICES OF THE COUNTY
 1918. OF KERRY (1).
 April 25.

National Insurance Act, 1911—Offence—Failure to give information—Wilful failure—1 & 2 Geo. 5, c. 55, s. 112, sub-s. 3—Construction of Statute—Punctuation.

The word "wilfully" in p. 112, sub-s. 3, of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), governs and applies to the words "fails to give such information or to produce such documents as aforesaid."

A conviction under this sub-section which omitted to find the defendant guilty of "wilfully" failing to give information held bad.

CERTIORARI.

Application to discharge a conditional order for certiorari.

The conditional order was made on the grounds that the order of conviction did not state that the defendant "wilfully" failed to furnish information, and, therefore, disclosed no offence. At the

(1) Before GIBSON, MADDEN, and KENNY JJ.

Petty Sessions District of Brosna, County Kerry, the Irish Insurance Commissioners proceeded against Edmund O'Connor for "that the defendant on the 29th day of August, 1917, at Carrigeen, in the said county, did wilfully delay John Dennehy, an Inspector, under sect. 112 of the National Insurance Act, 1911, and being the occupier of premises where the said inspector John Dennehy had reasonable grounds to suppose that employed contributors were employed did fail to furnish him with such information as he, the said John Dennehy, did then reasonably require." An order was made as follows:—"The defendant is convicted, that he being the occupier of premises where the said inspector John Dennehy had reasonable grounds for supposing that employed contributors were employed did fail to furnish said John Dennehy with such information as he, said John Dennehy, did then reasonably require under sect. 112, sub-s. 2, of the National Insurance Act, 1911."

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S. L. Devitt, for the Irish Insurance Commissioners:—

The offence consists in failing to give information. The word "wilfully" is not a necessary ingredient in the description of the offence. "Fail" per se imports moral blame.

[Gibson J.—In some cases "fail" imports moral delinquency. The meaning of "wilfully" was discussed in *Taylor v. Nixon* (1).]

Bernard Roche, for the prosecutor:—

The conviction is bad. The defendant is only convicted of failing to give information, not of wilfully failing to give it. The justices' view is apparent on the face of the conviction. They struck out the portion of the summons dealing with "wilfully delay." In *R. (Sheehan) v. Justices of the County of Waterford* (2) "wilfully" was held to govern all the alternatives, even though it was necessary to pass over a comma in order to give this construction. There is no comma to pass in the present case. "Fail" can have either a guilty or an innocent meaning. The guilty meaning should not have been applied against the defendant.

(1) [1910] 2 I. R. 94.

(2) [1914] 2 I. R. 178.

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The judgment of the Court was delivered by GIBSON J. :—

The question raised is whether "wilfully" in sect. 112, sub-s. 3, of the National Insurance Act, 1911 (1 & 2 Geo. 5), governs and applies to the words, "fails to give such information or to produce such documents as aforesaid." The word "fail" sometimes connotes blamable failure, but it also may mean omission to perform an expected or required act. The justices understood the word in the latter sense, and considered that the offence was complete when the defendant did not give the information required, irrespective of intention. The earlier part of the subsection deals with three matters, delay, obstruction, and failure, and is separated from the following portion of the sub-section by a comma, which is not immaterial, if we can look to punctuation which, as it has been recently held, may be legitimate. We are of opinion that the enactment creating a criminal offence must be read as making wilfulness an essential part of all three offences, obstruction and failure to give information as well as delay. There might be innocent obstruction (as explained in *Taylor v. Nixon*) (1) as well as innocent failure, and what is punishable is intentional violation of duty.

Solicitor for the Irish Insurance Commissioners : *Hugh Horan*.

Solicitor for the prosecutor : *R. C. Meredith*.

A. E. C.

(1) [1910] 2 I. R. 94.

GORDON & Co. v. KIRK & Co (1).

(1914. No. 1686.)

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May 14.

War—Emergency Legislation—Practice—Execution for costs—Leave to issue—Action on pre-war contract—Judgment for defendants—“Sum of money to which this sub-section applies”—Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), sect. 1, sub-s. 1 (a); Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25), sect. 6.

In an action on a pre-war contract the defendants succeeded, and were awarded judgment for their costs.

Held, that the Courts (Emergency Powers) Act, 1914, applied to a judgment for costs only, and that leave to proceed to execution was necessary.

Dobb v. Dobb ([1918] 1 Ch. 443) followed.

APPLICATION by the defendants, Kirk & Co., under the Courts (Emergency Powers) Acts, 1914 to 1917, by way of original motion, for leave to proceed to execution or otherwise to the enforcement of an order of the Court of Appeal, dated April 15th, 1918. The action was one for the price of goods sold and delivered under a contract made in 1912, and for damages for non-acceptance. The defendants counter-claimed for damages for delay in delivery. At the trial a verdict was found for £333 with costs for the plaintiffs; and on the counterclaim a verdict for £25 was given for the defendants.

The defendants applied to the Divisional Court to set aside the judgment for the plaintiffs, and to increase the amount of damages given on the counterclaim. The Divisional Court refused the motion with costs. The defendants appealed to the Court of Appeal, which set aside the judgment for the plaintiffs, and instead ordered judgment to be entered for the defendants with costs of the trial, of the motion in the Divisional Court, and of the appeal. The Court affirmed the judgment for £25 in favour of the defendants on the counterclaim.

The defendants now applied to the Court for liberty to issue execution or otherwise to enforce their judgment for these costs and damages.

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

Appeal. *D. M. Wilson K.C.* (with him *Serjeant Matheson* and *Davison*),
 1918. for the defendants:—

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In the case of *Dobb v. Dobb* (1) the Court of Appeal in England has decided that the Emergency legislation applies to every order for the payment or recovery of any sum of money not expressly or impliedly excluded from the Courts (Emergency Powers) Acts. Sect. 6 of the Act of 1917 enacts that the provisions of sect. 1, sub-s. 1 (a), of the Courts (Emergency Powers) Act, 1914, shall not apply "to any judgment or order for recovery or payment of any sum of money or costs given or made in any action of tort." This section would have been unnecessary, at any rate, as regards the costs of actions of tort if the prior acts had not expressly or impliedly included them. In *Torres v. Torres* (2) Eve J. held that where in an action on a contract made prior to August 4th, 1914, judgment for the plaintiff was given merely for costs, leave to issue execution was not required under the Act of 1914; but he was a party to the judgment in the following year in *Dobb v. Dobb* (1), in which it is pointed out by the Court of Appeal that the question is mainly one of practice. There is no reason why this Court should not follow that decision. The Irish judges have apparently taken the opposite view, although there has been no reported case in the Irish Courts on the point. Having regard to the decision of the English Court of Appeal, the defendants would not be safe in proceeding to execution without the protection of an order giving them leave to do so.

Hanna K.C. (with him *Wylie K.C.* and *T. W. Brown K.C.*), for the plaintiffs.

SIR IGNATIUS J. O'BRIEN C.:—

I agree with the view expressed by Mr. Justice Eve in *Dobb v. Dobb* (1), that it is of great advantage that uniformity and unanimity should prevail in such matters. Inconvenient though the decision of the Court of Appeal in England may be in some cases, still it must be remembered that the judgments were arrived at after careful consideration; and even if I were inclined to differ

(1) [1918] W. N. 105, since reported [1918] 1 Ch. 443. (2) 33 T. L. R. 547.

from that decision, I should hesitate very much before doing so, because I think it is desirable that there should be uniformity of practice in both countries; but contrary to my pre-conceived view I am now of opinion that the judgment of the English Court of Appeal is correct. The key to the whole matter is, I think, to be found in the Act of 1917.

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Sir Ignatius J.
O'Brien C.

The question which has been debated with considerable divergence of opinion among judges and the profession prior to the Courts (Emergency Powers) Act, 1917, was, on the one hand, that every case was presumed to be included in the Act of 1914 except the one case of money due in pursuance of a contract made after the 4th August, 1914, while, on the other hand, the view was put forward that, at any rate, it did not apply to an order for payment of costs. It is perfectly manifest that different considerations arise with regard to cases where an action is brought in pursuance of an alleged contract, where the contract is found in fact to have been made, and cases where a contract is found not to have been made at all. In the latter case it is extremely difficult to see how the order for costs could be made in pursuance of a contract which never existed. Where an action is brought in pursuance of a contract made before August, 1914, and the order is made afterwards for costs, one may say that the whole subject-matter is attracted back to the date of the contract, but in a case where there is no contract it is perfectly clear that the conditions are totally different.

But be that as it may, when I come to the amending Act, 1917, I find it enacted that "the provisions of sect. 1, sub-s. (1)(a), of the Courts (Emergency Powers) Act, 1914, shall not apply to any judgment or order for recovery or payment of any sum of money or costs given or made in any action of tort . . . whether before or after the commencement of this Act." If, as this section pre-supposes, an order simpliciter for costs in an action for tort was within the provisions of sect. 1 of the Act of 1914, an order simpliciter for the payment of costs in an action brought on a supposed contract (held ultimately not to have existed) would also appear to be within the provisions of that section. Accordingly, I see no escape from the decision of the Court of Appeal in England. The result may lead to inconvenience and necessitate

Appeal. the making of orders under the Acts in numberless cases where
 1918. orders for the payment of costs have been obtained in the Civil Bill
 GORDON & Co. and Chancery Courts, but it will require legislation to remedy this.
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RONAN L.J. :—

I concur. It seems to me to be extremely undesirable in the case of an Imperial statute for this Court to put a different construction on the Act from that adopted unanimously, after full consideration, by the English Court of Appeal. By the Act of 1914, sect. 1, sub-s. 1, sums of money due and payable in pursuance of a contract made after the beginning of August 4th, 1914, are excluded; and I agree with the Lord Chancellor, that but for sect. 6 of the Act of 1917 the Act of 1914 would still include any judgment or order for recovery or payment of any sum of money or costs given or made in an action of tort. The principle of the decision of the Court of Appeal in England is, as I take it, that everything is included except what is excluded by sect. 1 of the Act of 1914 as amended by sect. 6 of the Act of 1917. Only one thing is excluded by sect. 1 of the Act of 1914, and that is money payable in pursuance of a contract made after August 4th, 1914. I have grave doubts whether money due under an order for costs in an action of contract is money due and payable in pursuance of a contract. It is, in my opinion, money due and payable under an order of the Court. Therefore, it follows that in any action of contract in which the defendants succeed in proving that there was no contract and are awarded costs, the exception cannot possibly apply. If there is a judgment for the defendants with costs, one must inquire on what grounds they succeeded; whether it was on the grounds that there was no contract or whether it was on the basis that there was a contract. For these reasons, I think the judgment of the Lord Chancellor is right; and if any difficulties arise, it will be for the Legislature to provide a remedy.

MOLONY L.J. :—

I concur in the judgment of the Court, and I fully endorse the view of Mr. Justice Eve as to the advantage of unanimity in the practice of the Courts. Sect. 1, sub-s. 1, of the Courts (Emergency

Powers) Act of 1914, containing the exclusion, is certainly in wide and general terms. After the Act was passed, the Irish judges met, before the Spring Assizes of 1915, to consider the scope of the Act, and they approved of a statement that the statute was not intended to apply to "an order for costs only," and that in such a case an application to the Court under the Act was not necessary. This construction has prevailed in this country ever since; but sect. 6 of the Courts (Emergency Powers) Act of 1917 amounts almost to a declaration by the Legislature that as regards an order for costs only, other than such an order in an action of tort, the statute is to have a different construction. Having regard to the terms of that section, I think the case of *Dobb v. Dobb* (1) was rightly decided on the particular facts then before the Court of Appeal. I do not wish in the slightest degree to say that the decision in that case has any operation whatever as regards the costs given as incident to an ordinary judgment for a debt payable in pursuance of a contract entered into after August 4th, 1914. I think that the debt and costs in such a case form one sum which is excluded from the operation of the statute, and that no application to the Court for leave to proceed to execution is necessary. In the present case the order is limited to costs payable under an order of the Court, and I am quite unable to distinguish it from *Dobb v. Dobb* (1). In my opinion it is necessary to obtain leave to issue execution in the present case.

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Solicitors for the plaintiffs: *Carson & McDowell.*

Solicitors for the defendants: *J. E. Peel & Son.*

C. L.

(1) Now reported [1918] 1 Ch. 443.

K. B. Div.
1918.

IN RE MAHON, A BANKRUPT.

May. 31.

Bankruptcy—Order and disposition—Lease of horse—Reputed ownership—Lessor's chattel in bankrupt's possession—Custom of particular business or trade—Bankruptcy Act, 1857 (20 & 21 Vict. c. 60), s. 313.

L. was the owner of a racehorse, and on 9th September, 1916, leased it to the bankrupt for three years on the terms that he should stable and keep the horse, and pay all expenses of running him, and that L. should receive half the stakes won. The lease was registered in accordance with Racing and Hunt Rules to that effect, and the details of such registration appeared in the Irish Racing Calendar for the information of parties interested in turf matters. It was proved that the practice of leasing racehorses was common and well known to persons concerned in or interested in horse racing. The horse (whose winnings were considerable) had been raced by the bankrupt in his own name, and was in his actual possession at the date of his bankruptcy, and during the currency of the lease.

Held, that the bankrupt was not the reputed owner of the horse within the meaning of section 313 of the Irish Bankrupt and Insolvent Act, 1857.

Before September, 1916, a horse called "Vagabond" was owned by Miss Adela Constance Langrishe. He was a thoroughbred, had been trained at the Curragh, and appeared to have been of considerable value. By a document in writing, dated the 9th September, 1916, Miss Langrishe leased the horse to the bankrupt on the terms that he was to keep the horse, to pay all expenses in connexion with running him, and that Miss Langrishe was to receive half the stakes won by the horse. The bankrupt appears to have been successful in his operations during the period he was in possession of the horse, and before January, 1918, the winnings amounted to £215.

The lease was on the 9th of September, 1916, registered under Rule 94 of the Rules of Racing and under Rule 93 of the Irish National Hunt Steeplechase, and appears in the Irish Racing Calendar of September 15th, 1916, as follows:—Lease under Rule 94 of the Rules of Racing and Rule 93 of the I.N.H.S.

Rules.—Horse, "Vagabond," three years. Lessee, Mr. R. A. Mahon. Lessor, Miss A. C. Langrishe. Date of lodgment, September 9th.

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Two affidavits were put in dealing with the matter, one by Miss Langrishe, in which she stated the facts, and the other by Mr. Charles Brindley, the Keeper of the Matchbook, who deposed as follows:—"It is a recognized and widely known custom and usage for owners of racehorses in Ireland to lease them to other parties, and No. 94 of the Rules of Racing and No. 93 of the Irish National Hunt Steeplechase Committee require any lease of a racehorse to be registered with me in the Registry Office in 14 Upper Merrion Street, and publication of such registration appears in the issue of the Irish Racing Calendar next following the date of such registration for the information of all parties interested in turf matters, and is quoted in the issue of the *Irish Times* next succeeding such issue of the Irish Racing Calendar. Such lease can be for a definite term of years or for a racing career; and it is to my own knowledge a well-known and recognized custom and usage of the turf for owners of racehorses to lease racehorses for the term of their racing career."

M'Gonigal K.C., for the assignees:—

This alleged custom is limited to persons interested in racing. A custom of trade by which goods are left in the possession of persons to whom they do not belong must, in order to exclude the doctrine of reputed ownership, be a custom known in business generally, and not merely to persons dealing in a particular market: *In re Goetz, Jonas, & Co.* (1); *Ex parte Powell, In re Matthews* (2). The custom must be well proved, and shown to be known not only to persons in the same trade, but to others likely to be creditors: *In re Hill* (3); *Ex parte Watkins, In re Couston* (4). Registration of a bill of sale has no effect in taking a chattel out of the order and disposition of the bankrupt: *In re Ginger* (5); *Hollinshead v. Egan* (6).

(1) [1898] 1 Q. B. 787.

(2) 1 Ch. D. 501.

(3) 1 Ch. D. 503 n.

(4) L. R. 8 Ch. App. 520.

(5) [1897] 2 Q. B. 461.

(6) [1913] A. C. 564.

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Hanna K.C., for Miss Langrishe :—

No credit was given on the faith of this horse being in the order and disposition of the bankrupt. In order to exclude the doctrine of reputed ownership it is not necessary to show that a particular creditor or the outside world would know anything whatever about a particular chattel one way or the other. "It is quite enough, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer ownership to be in the person having actual possession": per Lord Selborne L.C. in *Ex parte Watkins*, *In re Couston* (1), followed in *In re Peel*, *Ex parte Crossley* (2). In the present case Miss Langrishe did everything in her power to prevent reputed ownership by registering the lease of the horse. If she had not taken all necessary steps, her position might be different: *Bartlett v. Bartlett* (3). Horses sent for sale or return are not within the "reputed ownership" clause: *Ex parte Wingfield*, *In re Florence* (4). The existence of a custom notorious or well known in this particular business is proved, and the doctrine of reputed ownership is absolutely excluded: *Ex parte Turquand*, *In re Parker* (5); *In re James* (6).

June 8.

PIM J. :—

In this case the assignee asks for a declaration that at the time of the bankruptcy the bankrupt was in possession, by consent of the true owner, of a horse called "Vagabond," whereof the bankrupt was "the reputed owner"; and he further asks for an order that the said horse be sold for the benefit of the creditors of the bankrupt.

His Lordship stated the facts as above set out, and proceeded as follows :—

I accept the fact as alleged by Mr. Brindley, that leases of horses, in the form of the one with which we are concerned, are often made, and that the custom of leasing horses is well known to everyone who is concerned in the business of horse racing,

(1) L. R. 8 Ch. App. 520.

(2) [1894] 1 I. R. 235.

(3) 1 D. & J. 127, at p. 141.

(4) 10 Ch. D. 591.

(5) 14 Q. B. D. 638.

(6) 24 T. L. R. 15.

and to all those who are interested therein. I infer that it is a custom which has been in vogue for many years.

It has been argued on behalf of the assignee that, inasmuch as the horse was in the possession and order of the bankrupt, was being raced by him in his own name, and that as there was nothing either inside or outside the stable indicating that anybody else had an interest in him, it might be assumed, at all events by such persons as did not know of the custom, that the bankrupt was the reputed owner of the horse.

It seems to me that there is a great deal of misunderstanding as to the meaning of the words "reputed owner." It is worth while to regard the exact words of sect. 313 of the Bankruptcy Act of 1857:—"If any bankrupt at the time he becomes bankrupt shall by the consent and permission of the true owner thereof have in his possession, order, or disposition any goods and chattels whereof he was reputed owner." Reputed by whom? Surely not by any person who had seen the horse in the bankrupt's stable, and had thereupon chosen to advance money to the stable-owner. If that be the law, then many of the best-known cases on the subject of reputed ownership have been wrongly decided. By whom then? In the case of *Ex parte Watkins*, *In re Couston* (1), Lord Selborne lays down the true meaning of the words "reputed owner." In that case certain goods which had been purchased from the bankrupt, who was a warehouseman, but had been left, for the convenience of the purchaser, in the possession of the bankrupt, were claimed by the assignee in bankruptcy. Evidence was given that it was the usual custom of the wine and spirit trade in Liverpool to allow such goods to remain in the possession or under the control of the vendors in such warehouses as they were in at the time of the sale, until they were required by the purchasers for use. It was held that the existence of a custom of this nature excluded the doctrine of reputed ownership. "A custom," says Lord Selborne, "known to the whole trade and to all persons dealing with the trade surely is as well advertised—perhaps better advertised—than it would be by a notice over the door"; and Sir George Mellish adds:—"Now it is proved as a matter of fact that, according to the ordinary custom of their

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(1) L. R. 8 Ch. App. 520.

K. B. Div. business, and according to the ordinary custom of the business of
 1918. all persons in the same trade, goods sold are allowed to remain,
In re and remain for years, in the bonded warehouse of the vendor.
MAHON. That being so, and being known to all persons in the business,
 Pim J. can they be held to be the reputed owners of the goods so left
 in their possession, which surely must mean reputed to be the
 owners by the persons who have dealings with them, and who
 might be deceived by the goods remaining in their possession?"

At page 528 Lord Selborne says as follows:—"The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of the particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed; but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject." Now, what does Lord Selborne mean by the words "those who know their situation" in the above passage? Applying them to this case, it seems to me clear that he means those who are either concerned or interested in the occupation of horse racing, or who have made themselves acquainted with the nature and customs of that occupation. It cannot mean that any particular creditor of the bankrupt—say his baker—who did not know the customs of racing, and who came to the conclusion that the bankrupt was the reputed owner of the horse, can by such conclusion make him, in fact, the reputed owner. The situation is not merely that a horse is seen in or known to be in the bankrupt's stable. One of the facts which go to make up the situation is that the horse is a

race horse, a kind of property subject to very special and often complicated conditions of ownership, and also subject to the rules and regulations of a well-known society which deals with racing affairs. That is the situation. No person with a knowledge of all the facts, or who, admitting himself to be ignorant, had made inquiry in regard to the facts, could have drawn the absolute inference that the bankrupt was "the reputed owner" of the horse. He might, indeed, have equally well drawn an inference the other way. There must be reasonable judgment as to the ownership, and, with such a situation, no judgment could be reasonable on the part of an ignorant person except it had been come to as the result of inquiry. If I myself might venture to put into the form of a definition the doctrine laid down by Lord Selborne, I would say that reputed ownership means that "there is that in the situation of the goods sufficient to justify a person who knew the facts and the situation, and who could and did exercise a judgment thereon, in coming to a conclusion that the absolute ownership is in the bankrupt." There must be a repute which is reasonable—that is, founded on a reasonable inference from the facts, and it must be a repute which any reasonable man knowing the facts would be justified in assuming. Reputation of ownership cannot be obtained by questioning the man at the corner of the street, but must be the opinion of ownership held by the man whose opinion is of value as a judgment. If I am right in this view as to the meaning of the words, it seems to me clear that there was, in fact, in this case no reputed ownership. I desire to refer to one other case, inasmuch as it is not very unlike the case before us, namely, *Ex parte Wingfield, In re Florence* (1). That was the case of the loan of a horse by one horse dealer to another for the purpose of the borrower showing it to customers from time to time with a view to its sale. The custom was proved; but it was in that case also argued that, inasmuch as the custom was only known to a certain number of people, the doctrine of reputed ownership was not excluded. Sir George Jessel (at p. 594) said:—"It is said that, according to the universal custom of the trade, horses are sent in this way on sale or return, and that, therefore, the possession of a horse does not confer on the possessor the

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(1) 10 Ch. D. 591.

K. B. Div. reputation of ownership." The learned Master of the Rolls agreed
 1918. with the contention thus stated. It is clear from his judgment
In re that a man to be the reputed owner within the meaning of the
MAHON. section must be in a situation to be reputed owner by those who
 Pim J. understand. It is not enough that he may be reputed owner by
 those who do not understand.

Lord Justice James said:—"The section has always been construed as meaning this: that if the goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing the goods for the benefit of those who have given the credit." This point, raised by the learned Lord Justice, is different from, but no less important than, the point discussed by Sir George Jessel. How can it be suggested for a moment that Miss Langrishe has permitted the bankrupt to obtain the credit which he has obtained (presuming even that it was obtained by means of the horse) by anything she has done? She took all the precautions she could. She registered the lease. It was advertised in the *Racing Calendar* and, I must assume from Mr. Brindley's affidavit, in the *Irish Times*. What more could she have done to prevent a wrong use being made of possession by the bankrupt? If the argument of the assignee were correct, it would mean that no lease could ever be made of a horse, for, no matter how well known the custom might be, there would always be found those who had never heard of it. I am satisfied on all grounds that in law the horse "Vagabond" was not in the possession, order, or disposition of the bankrupt as reputed owner thereof; and I must, therefore, refuse this application, and Miss Langrishe, who has succeeded, must have her costs against the creditors' assignee.

Solicitor for the assignees in bankruptcy: *E. Rose Byrne.*

Solicitor for Miss Langrishe: *W. A. Lanphier.*

R. W. L.

HEFFERNAN, APPLICANT; THE SECRETARY OF
STATE FOR THE WAR DEPARTMENT, RESPONDENT (1).

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June 19.

*Workmen's Compensation—Accident arising out of employment—Special risk—
Compensation—Test of liability of employer.*

The applicant was employed by the War Department as a weighing supervisor at 33s. per week, which included an allowance for maintaining and repairing a bicycle owned and used by her in riding to and from her place of employment. If she did not use her bicycle, her cycling allowance would be stopped. Her duty was to check the weights of bales of hay purchased by the military at outlying farms, and to furnish "returns" to the baling supervisor each evening or the following morning. On the occasion of the accident she was returning from a farm on her bicycle with her book when she collided with another cyclist, was thrown from her bicycle, and her collar-bone broken.

The County Court Judge found that the accident arose "in the course of" her employment, but not "out of the employment."

Held, following *Dennis v. White*, [1917] A. C. 479, that the accident arose "out of the employment."

APPEAL from an order of the County Court Judge of Kildare, sitting as arbitrator under the Workmen's Compensation Act, dismissing the claim of the applicant, Frances Mary Heffernan, for compensation in respect of injuries sustained by her. The grounds upon which the appellant asked that the dismiss should be reversed were that the learned County Court Judge misdirected himself in point of law in holding—

1. That the said accident did not arise out of the applicant's employment.

2. That he was bound in law, upon the evidence before him, to hold that the said accident did not arise out of the said employment.

The applicant was employed as a weighing supervisor at Mullingar at thirty-three shillings per week. The salary included a cycling allowance for riding her bicycle to and from her place of

(1) Before O'CONNOR M.R., and RONAN and MOLONY L.JJ.

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employment. Her daily duties consisted of checking the weights of bales of hay purchased by the military authorities at farms far out in the country, and in making "returns" of the weights, to her supervisor in Mullingar, the same evening or the following morning. In her evidence the applicant stated that she was told by her superior, when she was engaged, that if she did not use her bicycle the cycling allowance would be stopped.

On the occasion of the accident the applicant was returning with her book and papers from her work at a farm in the country, when she collided with another cyclist, was thrown from her bicycle, and her collar-bone broken.

The learned County Court Judge in his report stated :—

"I found that the accident arose in the course of the employment.

"I found that it was not a condition of the employment that the applicant should be bound to use a bicycle, but that it was recognized by the employer that her work would be conveniently and expeditiously performed if she did so; and that for that reason an allowance for the maintenance and repair of the bicycle was made by the employer; that it was for the interest of the employer that she should use her bicycle going on her rounds, and generally in the performance of her duties.

"I considered that I was bound by the decided cases relied on by Mr. Devitt to hold that the accident did not arise out of the employment, inasmuch as the danger of a fall or collision on a country road was not a special or particular risk involved in, or peculiar to, the applicant's employment as weighing supervisor, being a risk common to all members of the public using bicycles on a public highway under ordinary circumstances."

Eforde, for the appellant :—

The learned County Court Judge has found that the accident happened "in the course of" the employment. The only question open here is whether the accident arose "out of" the employment. At the time of the accident, the employee was on her employer's business. She was returning, with her papers, to her lodgings, to complete her "returns" for her superior that evening or the following morning. The fact that she did part of

her duty in her lodgings does not disentitle her to recover. It was all done under the contract. It is true she was not ordered to ride her bicycle, but she was paid an allowance for doing so, and was told the allowance would be stopped if she did not use the bicycle. She accepted the allowance, and the employer paid it. The case of *Dennis v. White* (1) decides that the test no longer is whether the risk is one to which the employee is more exposed than any member of the public.

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Other authorities cited and discussed:—*Davidson & Co. v. McRobb* (2); *Cooper v. Healy* (3); *Edwards v. Wingham Agricultural Implements Company, Ltd.* (4); *Bett v. Hughes* (5); *Ince v. Reigate Education Committee* (6); *Greene, appellant*; *Shaw, respondent* (7); *Read v. Baker* (8).

Devitt, for the respondent :—

In *Dennis v. White* (1) there was a duty to use the bicycle; the employee did so in pursuance of an order. Here the bicycle was the applicant's own property, and she could use it or not as she pleased.

O'CONNOR M.R. :—

This is a plain and very simple case, and I am satisfied that if the learned County Court Judge had had before him the authorities which have been cited in this Court, the judgment which he would have pronounced would be the same as ours.

The facts are shortly these: The applicant was employed as a supervisor of farm produce for the purpose of fixing the quantity of produce that was to be taken over by the War Office. In order to carry out her duty it was necessary to travel through the country, and to make inspections on different farms. She was engaged to do this work at 33s. per week, and I have no doubt whatever that when her salary was measured at 33s. the fact that she would have to spend a considerable time on the roads was taken into account. Her duty was not merely to check weights.

(1) [1917] A. C. 479.

(2) [1918] A. C. 304.

(3) [1916] 2 I. R. 33.

(4) 6 B. W. C. C. 511 (N. S.).

(5) 52 S. L. R. 93; 8 B. W. C. C. 362.

(6) [1916] 2 K. B. 671.

(7) [1912] 2 I. R. 430.

(8) [1916] 1 K. B. 927.

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In addition, although it was not made a condition of her employment that she should use a bicycle to get over distances, it was strongly recommended to her that she should do so, and she was told she would get an allowance of 7s. per week in respect of same. She assented to that, and took the allowance of 7s. per week, and having done so, I think she was under an obligation to her employer to use a bicycle, otherwise she would be taking the allowance under false pretences.

In the course of her duty she had to inspect farm produce at farms far out in the country. In order to get to the particular farm in this case she had to ride there, and having done her duty she had to return home to her lodgings. The question is whether she was acting not only in the course of her employment, but, as Lord Dunedin put it, was she at the time doing something which was part of her service to her employer or master? I have no hesitation in saying that she was, because it was recognized that she was to get to the farm on a bicycle, and it was also recognized that she was to get back from the farm on her bicycle. That being under the contract, she remained in the service of her employer not merely when on the particular farm, but when she was going to it, and returning from it. Lord Finlay L.C. in *Dennis v. White* (1) says: "The only question is whether the accident arose out of the employment. It is not disputed that the appellant was riding the bicycle in the course of his employment, and by the orders of his employer. The risk of collision under such circumstances is incidental to the use of a bicycle; it is a risk inherent in the nature of the employment, and it was the cause of the accident. It follows that the accident arose out of the employment. It is quite immaterial that the risk was one which was shared by all members of the public who use bicycles for such a purpose. Such as it was, it was a risk to which the appellant was exposed in carrying out the orders of his employer."

It will be observed that Lord Finlay is speaking of a case in which the employee was using a bicycle under the orders of his employer. But there is nothing in the judgment that says that specific orders are necessary.

(1) [1917] A. C., at p. 481.

This is clearly shown by the remarks of Lord Parker at p. 493 of the report of the same case: "My Lords, inasmuch as expressions used by judges in deciding cases under the Act have so often been used in a way that their authors never intended, I desire to add a word of caution. I am dealing only with cases where the particular risk is involved in the particular thing which the workman is employed to do. I am not dealing with cases where the particular thing in which the risk is involved is not the particular thing which the workman is employed to do, but is one which, so far as his duties are concerned, he may or may not do at his own choice, though it be in fact done in furtherance of those duties. If, for example, a person employed as a lamplighter chose, in order to save time, to ride a bicycle between lamp-posts on his round, and in so doing met with injury by collision, I doubt whether it could be inferred without more that the injury by accident arose out of his employment."

There is more in the present case than the use of the bicycle. There is this element in it: that not merely was it in the contemplation of the employer, but it was represented to her that it would be a proper and convenient way of doing her duty. It was even more, because she was informed she would not get the allowance unless she used the bicycle.

In the case of the lamplighter, referred to by Lord Parker, he says he doubts whether it could be inferred without more that the injury by accident arose out of his employment. "The case for such an inference would, no doubt, be strengthened by proof that this was the well-known practice of persons employed as lamplighters, and must, therefore, have been contemplated by both employer and employed as a probable, or at least possible, mode of the employed fulfilling his duties, just as it is both possible and probable that factory hands will walk or go by 'bus, train, or bicycle to the scene of their labours, though no one would at present contemplate their arrival by aeroplane." These words are strictly applicable to the present case, because not merely was it contemplated that a bicycle should be used, but, in the circumstances, it must be recognized as the only way in which the duties could be satisfactorily performed—that is to say, economically and efficiently performed so as to render proper services. It

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occurs to me that the case comes within the observations of Lord Parker, and I am certain if Lord Parker's judgment had been before his Honor Judge Brereton Barry he would have complied with the requisition submitted by Mr. Toomey.

The County Court Judge says in his report:—"I found that the accident arose in the course of the employment. I found that it was not a condition of the employment that the applicant should be bound to use a bicycle, but that it was recognized by the employer that her work would be conveniently and expeditiously performed if she did so." I differ there from the County Court Judge, for I think it was accepted as a condition by the employee, an allowance having been made for the bicycle. I am certain that if the case of *Dennis v. White* (1) had been brought to the notice of the County Court Judge he would have found that the accident arose out of the employment in the sense that out of the employment properly means, as pointed out by Lord Dunedin, doing something which is part of her service to her master. The inspection and checking had not only to be made on the farm, but the result had to be brought back to Mullingar, and until she brought in the result she was really in the service of the employer.

RONAN L.J. :—

I am of the same opinion. As we are reversing the decision of so careful and accurate a judge as Judge Barry, I think it only right that I should state shortly the grounds on which I have formed that opinion. Judge Barry says in his report:—"I considered that I was bound by the decided cases relied on by Mr. Devitt to hold that the accident did not arise out of the employment, inasmuch as the danger of a fall or collision on a country road was not a special or particular risk involved in or peculiar to the applicant's employment as weighing supervisor, being a risk common to all members of the public using bicycles on a public highway under ordinary circumstances." That was the ratio decidendi of the learned judge. On the authorities cited to him by Mr. Devitt, in my opinion Judge Barry was perfectly right.

There was a series of decisions in England, followed in this country by this Court, to the effect that where the risk of the injury in question is one common to all mankind using a highway the accident does not arise out of the employment. One of the latest of these cases was the decision of the majority of the Court of Appeal in England in *Dennis v. White* (1). The head-note sufficiently gives the effect of the decision:—"Where a workman in the course of his employment was required to ride a bicycle belonging to his employers through the streets of London on an average once a day, and while so doing was knocked down and injured by a motor car: Held, by Lord Cozens-Hardy M.R. and Phillimore L.J., Sargent J. dissenting—1, that the accident did not arise out of the employment, but was something which might happen to any ordinary member of the public riding a bicycle in the streets; and; 2, that the question whether the accident did or did not arise out of the employment was one of fact upon which the decision of the County Court Judge was final." There were many others to the same effect.

It is plain that if the law was as stated in this and other cases, Judge Barry's decision would have been in accordance with the law. However, there was an appeal to the House of Lords in *Dennis v. White* (2). The head-note sufficiently states the effect of the decision:—"Where a workman is sent into the streets on his employer's business, whether habitually or occasionally, and whether on foot or on a bicycle, or on an omnibus or a car, and he meets with an accident by reason of a risk of the streets to which his employment exposes him, the accident arises out of as well as in the course of his employment; and it is immaterial that the risk which caused the accident is one which is shared by all members of the public using the streets under the like conditions." The view of the First Division of the Court of Session in Scotland upon this point, as expressed in *M'Neice v. Singer Sewing Machine Company* (3); *Hughes v. Bett* (4); and *White v. Avery* (5), preferred to the view of the Court of Appeal in England, as

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(1) [1916] 2 K. B. 1.

(2) [1917] A. C. 479.

(3) [1911] S. C. 12.

(4) [1915] S. C. 150.

(5) [1916] S. C. 209.

Appeal. expressed in *Pierce v. Provident Clothing and Supply Company* (1)
 1918. *Sheldon v. Needham* (2); and *Slade v. Taylor* (3).
 HEFFERNAN v. A boy in the employment of a firm of builders was ordered to
 SEC. OF STATE go through the streets of London on a bicycle to fetch some plaster.
 FOR WAR. He came into collision with a motor car and was injured. Held—
 Ronan L.J. 1, that the accident arose out of the employment; 2, that the
 facts being not in dispute, this was a question not of fact, but
 of law.”

It is obvious that on the law as there laid down the principle of the decision in the present case was erroneous. The decision of the House of Lords was not brought to the notice of Judge Barry. (I don't think it was reported at the time.) There cannot be the least doubt that if it had been brought to his notice his decision would have been the same as ours. In the present case Judge Barry did not disbelieve any portion of the claimant's evidence. He accepted it, and on it felt bound by the authorities to hold as he did. Lord Finlay L.C. says in *Dennis v. White* (4):—“As regards the second ground, I think that the decision of the County Court Judge was in no sense a decision on a question of fact. “No fact was in dispute, and the case did not depend on any inference of fact to be drawn from the facts admitted. The only question in the case was whether, on the admitted facts, the accident arose out of the employment.” I think every word of that applies to this case.

Mr. Fforde has argued, and I think properly argued, that the question as to the accident having arisen “in the course of” the employment, must be treated as closed in this case. In my opinion Lord Finlay's remarks as to decisions on law and fact apply to the question whether the accident arose “in the course of the employment” in the same way as they do to the question whether it arose “out of the employment,” and for the same reason I think both are questions of law in this case.

When the relative meanings of “arising out of” and “in the course of” come to be considered in any future case the judgment of Lord Dunedin in *Davidson & Co. v. M'Robb* (5) must be

(1) [1911] 1 K. B. 997.

(3) [1915] 8 B. W. C. C. 65.

(2) [1914] 7 B. W. C. C. 471.

(4) [1917] A. C. 479, at p. 488.

(5) [1918] A. C. 304.

carefully considered. At p. 321 he says:—"My Lords, I shall first consider the words of the Act apart from authority. It is obvious that the addition of the words 'and in the course of' are meant in some way either to qualify or further explain the words 'out of.' My own view is that they do the latter. It is in one sense difficult to imagine that there could be any injury held as arising out of the employment which would not also be in the course of the employment. Let me instance the case of the domestic servant who is run over in the street. Given but the two facts that the man is, e.g., a butler, and that he is run over in the street, you would not be able to decide whether the injury arose out of the employment or not. The facts are consistent with either supposition. But given the further fact that either, 1, he has been sent by the master on a message, or, 2, that he is enjoying an evening out, then you can determine whether he is in the course of his employment or not, and from that, if being run over is one of the inherent dangers of the street, you will be able to determine whether the injury arose out of the employment or not. Now, I have taken this illustration of a domestic servant purposely, because domestic servants are not, as colliers and other workmen often are, engaged from day to day, but are engaged for a term, and the accident that happens is during the period of their engagement. In my view 'in the course of employment' is a different thing from 'during the period of employment.' It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt, it need not be actual work, but it must, I think, be work or the natural incidents connected with the class of work, e.g., in the workman's case, in the taking of meals during the hours of labour; in the servant's, not only the taking of meals, but resting and sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof."

In the present case, the applicant was not employed to do the bulk of her work in any specific place, but there was one thing which was fixed in point of place, and that was that she had to get her orders in Mullingar as to where she was to go each day, and she had to bring in to Mullingar the result of her work of the day. Therefore, if the only farm she was employed on was the

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Appeal. farm in this case, her duty was to go to the farm and there examine
 1918. the hay, and when she had examined it bring back the result of
 HEFFERNAN her examination either definitely written out, or in the form of
 v. notes, and deliver it to her employer before the following morning,
 SEC. OF STATE in Mullingar. Surely, it cannot be contended that when she had
 FOR WAR. gone to the farm, and had taken her notes, and was actually
 Ronan L.J. bringing them back to Mullingar in order to give them to the
 officer of munitions in Mullingar, she was doing anything more or
 less than what she was directed to do by her master. If that be
 so, there is no question left except that in reference to the bicycle.
 They paid her 7s. a week in order to have an efficient bicycle to
 do the work. Can it be suggested that when she was doing these
 runs on the country roads, on a bicycle which she was paid for
 keeping in good order, the risk of a bicycle accident was not one
 reasonably within the contemplation of both the parties?

I use that expression because in the case of *Cooper v. Healy* (1) in this Court, we endeavoured to reconcile the cases up to that date, and we considered that the test should be that the risk should be reasonably within the contemplation of both the parties. For these reasons, I concur in the judgment of the Master of the Rolls.

MOLONY L.J. :—

This case cannot be distinguished from *Dennis v. White* (2). Mr. Devitt has endeavoured to distinguish it on two grounds. In the first place he points out that the appellant in *Dennis v. White* (2) was a boy who was ordered to go on a bicycle to fetch some plaster, but in this particular case there was no order to go on a bicycle, and that it was optional for the appellant here to use a bicycle or not. Mr. Devitt submits that a specific order must be passed. It is not a question of an order, but the question is whether the use of a bicycle was reasonably contemplated by both parties as a proper and convenient mode of discharging the applicant's duty to her employer. A person in her position has to travel considerable distances to get to the place where she is to supervise the

(1) [1916] 2 I. R. 33.

(2) [1917] A. C. 479.

weighing of the hay, and in order to assist her to arrive at her destination she was actually paid 7s. per week to keep a bicycle efficient for the work. Having accepted the 7s. a week, she was not only entitled, but bound, to use it for the purpose of her business; and I have no doubt that it was strictly within the contemplation of both parties that she should use the bicycle, and that it was the recognized mode of doing the work for which she was engaged.

The second point on which it was sought to distinguish *Dennis v. White* (1) was this: that the accident did not arise out of the employment, because the work on which she was engaged on that day was finished, and she was not bound to bring in the result of her work until the next morning. Mr. Devitt, however, repudiates the suggestion that she was engaged on a joy ride, or anything of that sort. He admits that having finished her work on this particular day, at this particular place, she proceeded on her return journey to Mullingar, and in the course of that journey the accident happened. Was she engaged on the business of her employer on that return journey? Clearly she was. Although she might deliver the result of her day's work either that evening or the following morning, unquestionably during her journey to Mullingar she was engaged on her employer's business. That being so, it is impossible to say she was not acting in the course of her employment, or that the accident did not arise out of her employment. It seems to me that this case comes exactly within the general principle laid down by Lord Finlay in *Dennis v. White* (1), at p. 482: "If a servant in the course of his master's business has to pass along the public street, whether it be on foot or on a bicycle, or on an omnibus or car, and he sustains an accident by reason of the risks incidental to the streets, the accident arises out of, as well as in the course of, his employment. The frequency or infrequency of the occasions on which the risk is incurred has nothing to do with the question whether an accident resulting from that risk arose out of the employment."

There is a word of caution in the subsequent judgment of Lord Parker, as to when it can be considered as reasonably within

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the contemplation of the parties that a particular mode of procedure on a journey was contemplated. He instances the case of a person in the position of a lamplighter who might have walked or, if he chose, use a bicycle. That is a case in which the Court would be bound to consider whether it was within the reasonable contemplation of both parties that a bicycle should be used. In this case, it was unquestionably within the contemplation of both parties that a bicycle should be used. The applicant actually received the allowance from her employer in order that she might maintain an efficient bicycle for the purpose.

I agree with my colleagues that if the case of *Dennis v. White* (1) had been brought under the notice of Judge Barry he would not have given effect to the line of authorities the other way. The case of *Dennis v. White* (1) is in harmony with the Scotch decisions which have now received the approval of the House of Lords. In the circumstances, we must send the case back to the judge below to proceed with the arbitration.

Solicitor for the applicant: *Henry K. Toomey.*

Solicitor for the respondent: *The Chief Crown Solicitor for Ireland.*

H. J. M'C.

BRADSHAW *v.* M'MULLAN.K. B. Div.
1918.

Landlord and tenant—Rates—Poor-rate—Agreement to deduct from rent— April 18, 22,
Estoppel—Res judicata—Local Government (Ireland) Act, 1898, sect. 52, 23, 24.
sub-s. 2.

By an agreement in writing dated 1st September, 1908, M., a tenant, agreed to take from B., a landlord, a large portion of a business house in the city of Dublin for a term of thirty-one years from 1st January, 1909, at the yearly rent of £240, "including all rates and taxes at present existing or assessed on said premises." For some years subsequently to the date of the said agreement, the tenant's claim to credit for poor rates, as well as for other rates, had never been disputed. In certain mortgage proceedings between the parties in the Chancery Division, and in proceedings for rent in the King's Bench Division, the landlord's obligation was admitted, but subsequently the landlord B. refused to allow the tenant credit for the poor rates, part of the entire rates of the premises, relying on sect. 52, sub-s. 2, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37).

In an action for rent in which the tenant pleaded that he was entitled to credit for the poor rates paid by him,

Held (per Gibson and Kenny JJ., Madden J. diss.), that the tenant was entitled to credit for the poor rate paid by him.

(Per Gibson J.), that there is nothing in sect. 52 of the Local Government (Ireland) Act, 1898, to preclude the landlord at the time a tenancy is created from undertaking liability for poor rate; also that the landlord was estopped.

(Per Kenny J.), that the Court was bound by the decisions of the Court of Appeal in *Bryans v. Callaghan*, 42 I. L. T. 97, and *Allen v. Carroll*, [1911] 2 I. R. 190.

(Per Madden J. diss.), that sect. 52, sub-s. 2, of the Local Government (Ireland) Act, 1898, made the contract between the parties void.

In the present action the plaintiff sued for £140, being seven months' rent of the premises. The defendant paid into Court a sum less than this by £27 6s. 7d., the whole of the rates paid by him during the period in respect of the premises.

The following statement of the facts is taken from the judgment of Gibson J. :—

The material facts may be shortly stated. Under a proposal, dated September 1st, 1908, accepted by the plaintiff, the defendant

K. B. Div. agreed to take a lease for thirty-one years from 1st January, 1909,
1918. of portion of 30 Bachelors' Walk, Dublin, at the yearly rent of
BRADSHAW £240, "including all rates and taxes as at present existing or assessed
v. M'MULLAN. on said premises, but we agree to pay five-sevenths of all future
or increased taxation caused by the alterations or improvements
hereinafter stipulated." The rent was to be paid quarterly, but it
was afterwards agreed that it should be paid monthly at £20 per
month. The tenant was to spend £400 on certain improvements,
which were duly made. The house was at this time valued in two
portions, one at £30, the other at £60, including the greater part
of the defendant's section. On revaluation subsequently the defend-
ant's portion was valued at £110, and the defendant was rated
as occupier and paid rates accordingly, for which he was allowed
credit until recently. An arrear of £500 having become due, the
defendant by deed, dated 17th September, 1913, mortgaged prop-
erty of his at Elm Park to secure such arrear with interest, the
deed reciting that the tenant had paid certain rates and taxes
which he was not bound to pay under his lease. The defendant as
mortgagor covenanted to pay the said £500 with interest, less any
money paid by him in respect of rates and taxes which he was not
bound to pay under his lease. The deed, therefore, was for
valuable consideration, not only as to the security, but as to interest
on the arrears. At this date the tenant's claim to credit for poor
rates as well as for other rates had never been disputed, and had
been always allowed in his rent payments. A suit was afterwards
instituted in respect of this mortgage, in which an account had to
be taken. The landlord's obligation was admitted save as to the
five-sevenths, which the plaintiff insisted should be borne under
the contract by the defendant. It is to be noted that if the plaintiff's
present contention was well founded, namely, that the defendant
was obliged to pay the entire, poor rates, the special contract as to
five-sevenths had no substantive effect whatever. The Court
decided that the tenant was not affected by the contract, as the
increase in the valuation had not been caused by the improve-
ments, but was accounted for by general causes. The account was
accordingly taken and settled on that footing, credit for all rates
being allowed. An action for rent subsequently due was at the time
of the suit pending, in which a final judgment motion had been

brought. The application was adjourned till the decision in the mortgage suit. After the judgment of the Master of the Rolls, a consent on 15th February, 1915, in the rent action was made a rule of Court on the basis that full credit for poor rates should be allowed, and defendant was to pay certain costs.

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Dickie K.C. (with him *Jellett K.C.* and *James Henry*), for the defendants:—

In sect. 52, sub-s. 2, of the Local Government (Ireland) Act, 1898, "contract" only refers to contracts then existing, not to contracts entered into after the Act. The only motive for the section was to adjust rents. *Haslett v. Sharman* (1) shows that only existing contracts are referred to. In sect. 71 of the Poor Law Act, 1838, future contract is expressly referred to. If it was the policy of the Local Government Act to make the ratepayers see that their rates were properly expended, why was not this policy applied to the ordinary rates of the city of Dublin? "Shall" does not refer to futurity in modern statutes (Craies on Statutes, 1911 ed., p. 165). The object of sect. 52 was to deal with the case of the £4 tenant and nothing more: *Kerrison v. Cole* (2); *Mouys v. Leake* (3); *Payne v. Mayor of Brecon* (4).

The contract prohibited is only a contract for deduction: *Ludlow v. Pike* (5); *Williams v. North's Navigation Collieries* (6); *Hewlett v. Allen* (7); *Bryans v. Callaghan* (8); *Allen v. Carroll* (9); *Haslett v. Sharman* (1); *Pickering v. The Ilfracombe Railway Company* (10). The plaintiff is estopped by contract from raising this point: *Wilson v. M'Intosh* (11). A man may by conduct waive the provisions of an Act of Parliament intended for his benefit: *Cairncross v. Lorimer* (12). A verbal consent has been held sufficient for sect. 2 of the Land Act of 1881. Here the plaintiff allowed the defendant to expend money.

(1) [1901] 2 I. R. 433.

(2) 8 East, 231.

(3) 8 T. R. 411.

(4) 3 H. & N. 572.

(5) [1904] 1 K. B. 531.

(6) [1906] A. C. 136.

(7) [1892] 2 Q. B. 662; [1894]

A. C. 383.

(8) 42 I. L. T. R. 97.

(9) [1911] 2 I. R. 190.

(10) 8 L. R. 3 C. P. 235.

(11) [1894] A. C. 129.

(12) 3 MacQ. 827.

K. B. Div. The net point has been decided by the Master of the Rolls in 1918. the proceedings in his Court. This is a good estoppel if pleadable: *BRADSHAW v. M'MOLLAN*, *Jewsbury v. Mummery* (1); *Newington v. Levy* (2). The very point was raised in the plaintiff's affidavit before the Master of the Rolls. See *Great North-West Central Railway Company v. Charlebois* (3). Here the legality of the act was a matter in dispute, so there is a clear estoppel: *Joint Committee of the River Ribble v. Croxton Urban District Council* (4). See also *O. Comitti v. Maher* (5); *Hewlett v. Allen* (6); *Williams v. North's Navigation Collieries* (7); *Re Wilson* (8); *Smith v. Baker* (9). *Bateman v. Faber* (10) and *M'Naghten v. Paterson* (11) were cases of status, but even in such cases waiver has been allowed. See also *Humphries v. Humphries* (12); *Irish Land Commission v. Ryan* (13). "Deduction" under the Poor Law Act is a well-known term, and the Court is bound to give it a technical interpretation: *Hill v. East and West India Dock Company* (14), cited with approval in *Tozer v. Viola* (15). These premises were premises let in apartments, and if so there was nothing illegal in Mrs. Bradshaw agreeing to pay rates.

W. G. Gibson K.C. and *Mark B. Cooper*, for the plaintiff:—

The contract is free from objection if it does not extend to poor rate. We submit that poor rate is not included, because the language used is inappropriate to a tax such as poor rate, which is a personal one and not a charge on the premises: *Lally v. Concannon* (16); *Palmer v. Power* (17); *Scovell v. Gardiner* (18); *Gloster v. Murphy* (19); and also because the parties must be deemed to have contracted with knowledge of the provisions of sect. 52 of

- (1) L. R. 8 C. P. 56.
- (2) L. R. 6 C. P. 180.
- (3) [1899] A. C. 114, per Lord Hobhouse, at p. 124.
- (4) [1897] 1 K. B. 251.
- (5) 94 L. T. 158.
- (6) [1892] 2 Q. B. 662;
- [1894] A. C. 383.
- (7) [1904] 2 K. B. 44.
- (8) [1916] 1 K. B. 382.
- (9) L. R. 8 C. P. 350.

- (10) [1898] 1 Ch. 144.
- (11) [1907] A. C. 492.
- (12) [1910] 2 K. B. 531.
- (13) [1900] 2 Ir. R. 565.
- (14) 9 A. C. 448.
- (15) [1918] 1 Ch. 75.
- (16) 3 I. C. L. R. 557.
- (17) 4 I. C. L. R. 191.
- (18) 16 I. C. L. R. 318.
- (19) [1894] 2 I. R. 49.

the Local Government (Ireland) Act, 1898. If the contract is construed as including poor rate, it violates sect. 52 of the Local Government (Ireland) Act, 1898, because it involves deduction of the poor rate from the rent: *Bavercroft v. Welland* (1); and its effect is to shift the obligation in respect of poor rate from the occupier to the landlord: *Haslett v. Sharman* (2). The contract does not state that there is to be deduction, but deduction is what was plainly contemplated, and must take place in practice under a contract of the kind, and the Court will not permit the statutory prohibition to be evaded: *Tuff v. Guild of Drapers of the City of London* (3); *Ludlow v. Pike* (4); both decisions on analogous provisions of the Tithe Acts.

Allen v. Carroll (5) and *Bryans v. Callaghan* (6), relied on by the other side, cannot be treated as overruling the considered judgment of this Court in *Haslett v. Sharman* (2), which was not cited in either of those cases. They were franchise cases, and we submit that they were not decided upon sect. 52 of the Local Government (Ireland) Act, 1898.

The Court of Registry Appeal has regard to questions of fact, such as actual possession, occupation, or use, per FitzGibbon L.J.: *Roulston v. Kerlin* (7); and see comment of Palles C.B. on *M'Daid v. Galbraith* (8) in *Earl of Cork v. Cork County Council* (9). *Bennett v. Cairns* (10), as to whether there had been a bona fide payment of rates by the occupier, and *Roulston v. Kerlin* (7), as to whether there was a bona fide occupation, illustrate the kind of matters which weigh with that Court. In *Roulston v. Kerlin* (7) an objection founded on sect. 2 of the Land Act, 1881, was disregarded, the Court considering that its function was to determine whether there was a bona fide occupation irrespective of the legal title. We submit also that the observations attributed to Holmes L.J. in *Allen v. Carroll* (5) were at the most mere dicta, and it does not appear that they were concurred in by his colleagues.

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(1) 12 L. R. Ir. 35.

(2) [1901] 2 I. R. 433.

(3) [1913] 1 K. B. 40.

(4) [1904] 1 K. B. 531.

(5) [1911] 2 I. R. 190.

(6) 42 I. L. T. R. 97.

(7) [1908] 2 I. R. 335, at p. 338.

(8) [1901] 2 I. R. 490.

(9) [1903] 2 I. R. 490, at p. 502.

(10) [1890] Lawson, 216.

K. B. Div. Assuming that poor rate is covered by the contract, the
 1918. illegality as to that part of it does not vitiate the remainder,
BRADSHAW because the letting of the premises continues, and is a good
v. consideration for the rent: *Kearney v. Whitehaven Colliery*
M'MULLAN. *Company* (1); *Pickering v. Ilfracombe Railway Company* (2);
Gaskell v. King (3); *Howe v. Synge* (4).

No estoppel can validate a contract made void by statute: *Barrow's Case* (5); *Ashbury Railway Carriage and Iron Company v. Riche* (6); *In re Monolithic Building Company* (7); *Cornelius v. Phillips* (8). The cases cited by the other side are not in point, for example, *Humphries v. Humphries* (9), because the Statute of Frauds does not make a contract void or illegal: it is merely a matter of defence: *Maddison v. Alderson* (10); *Lacon v. Mertins* (11); Further, the pleadings disclose the illegality, and the Court is constrained, even though it should be against the wishes of the parties, to take cognizance of it and act accordingly: *Gedge v. Royal Exchange Assurance Corporation* (12); *North Western Salt Company v. Electrolytic Alkali Company, Ltd.* (13).

Jellett K.C., in reply.

Cur. adv. vult.

May 13.

GIBSON J.:—

This appeal is from a judgment of the Lord Chief Justice, in which, the law points not having been argued before him, he decided for the plaintiff, following the authority of *Haslett v. Sharman* (1). (His Lordship having stated the facts as above set out, continued:—)

The deed, judgment in the mortgage suit, and consent are relied upon as precluding the plaintiff from questioning the validity of the contract. The Lord Chief Justice considered that the opinion

(1) [1893] 1 K. B. 700, per Lord Esher M.R., at p. 711.

(2) L. R. 3 C. P. 235.

(3) 11 East, 165.

(4) 15 East, 440.

(5) 14 Ch. D. 432, at p. 441.

(6) L. R. 7 H. L. 653.

(7) [1915] 1 Ch. 643, at p. 653.

(8) [1918] A. C. 199, per Lord Finlay C., at p. 205.

(9) [1910] 2 K. B. 531.

(10) 8 A. C. 467, at p. 488.

(11) 3 Ath. 3.

(12) [1900] 2 Q. B. 214.

(13) [1914] A. C. 461, per Viscount Haldane, at p. 469.

of Bacon V.-C. in *Barrow's Case* (1), that there could be no estoppel against a statute, obliged him to rule against such estoppel, though, of course, if the Master of the Rolls had considered and decided that the contract was not invalidated by statute, the Chief Justice would have been bound to accept such decision as conclusive upon him.

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The trial and judgment of the Lord Chief Justice proceeded on the assumption that the rates for which credit was claimed were poor rates. It appears, however, that only portion of such rates, something over £9, was such in fact, the balance consisting of rates to which the credit claimed was applicable; but a determination against the defendant as to poor rate would fix him with the costs of action, as his tender and lodgment would be then insufficient.

The great number of lettings in the present form that have come into existence makes our decision of extensive importance. If the plaintiff's construction of the statute of 1898, sect. 52, in reference to this contract be correct, tenants will find that their rent is increased contrary to the true intention of the parties, and that the landlord's apparent obligation is turned into a debt of honour which he may legally repudiate.

I propose to consider the following points :—

1. The meaning of "rates" in the contract in its original form and as affected by subsequent dealing.

2. If poor rate was within the contract, what was the nature of the rights in respect of such poor rate between the landlord and tenant respectively?

3. What is the effect of sect. 52 in relation to the contract?

4. Is confirmation, estoppel, or res judicata applicable if the contract was nullified by sect. 52?

5. If the contract on its face conflicts with sect. 52, can this Court modify and mould the lease in such a way as to carry out the real intention of the parties; and if it has such jurisdiction ought it to do so?

6. Can the landlord, suing on the contract, rely on illegality to which he was a party for the purpose of exacting full rent calculated on the landlord's allowing the unlawful credit?

K. B. Div. 7. What is the effect of *Haslett v. Sharman* (1) and the
1918. registration cases?

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Gibson J. 1. If "all rates" include poor rate, they would also cover
"water rate": *Scovell v. Gardiner* (2). If the contract was a
completed lease, it may be doubtful on the authorities if the term
would here extend to poor rates, particularly after 1898, if a con-
tract as to poor rates was then forbidden and void—a matter
discussed hereafter; general words may be restricted to what is
legally competent: *Gaskell v. King* (3), and the passage from
Sheppard's Touchstone, cited by Baron Martin in *Fussell v.*
Daniel (4). I do not, however, find it necessary to decide this, as
the mortgage deed, following an uninterrupted course of dealing,
is a conclusive admission of contractual character and force, con-
firming or enlarging the meaning of "rates" in the contract. The
deed was for value, giving security and turning arrears of rent into
an interest-bearing debt.

2. No argument was addressed to the construction of the con-
tract, assuming that it comprehended all rates. The clause under
consideration consists of two parts: 1, the rent is to "include" all
existing rates; 2, the tenant is to pay five-sevenths of the increased
taxation resulting from specific improvements. Had the contract
been made before the statute, all increase of rates, outside this
special provision, would have been borne by the landlord, whether
caused by tenant's outlay or not, as in *Gloster v. Murphy* (5) and
Salaman v. Holford (6). The present ambiguous form of contract,
not stating who is to pay the rates, is not uncommon. *Gloster v.*
Murphy (5) is an example. It is susceptible of three possible
interpretations: 1, the tenant is to pay £240, composed notionally
of two parts—rent proper, and rates treated as rent. The true
rent would therefore vary with the amount of rates, falling as the
latter rose, but it would always be capable of accurate computa-
tion for the time being. Such variability is not inconsistent with
the existence of legal rent, whether corn rent or otherwise, as
appears from the notes to *Chun's Case* (7) and *Lloyd v. Keys* (8);

(1) [1901] 2 I. R. 432.

(2) 16 I. C. L. 318.

(3) 11 East, 165.

(4) 10 Ex. 581, at p. 597.

(5) [1894] 2 I. R. 49, at p. 50.

(6) [1909] 2 Ch. 602.

(7) Tudor's R. P. Cases.

(8) [1901] 2 I. R., at pp. 420, 421.

2, the landlord is directly himself to pay the rates for the tenant, as in the registration cases; 3, the landlord is to indemnify the tenant called upon to pay and paying the rates. If any of the above possible constructions would avoid conflict with sect. 52, the Court should adopt it if the words allowed, ut res magis valeat, the intention to exonerate the tenant being clear. The express duty on the tenant to pay in the case of the five-sevenths might somewhat assist the second or third interpretation. In *Haslett v. Sharman* (1) the landlord expressly agreed to pay.

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3. I now take up the large question, the effect of sect. 52, and whether the contract construed in the above ways or any of them is thereby made illegal. On the threshold, we at once reject the argument that sect. 52, sub-sect. 2, only applies to then existing tenancies, and does not extend to tenancies created after the Act. The enactment, drafted on lines similar to those of the Ground Game Act, 1880, c. 47, sects. 1 and 5, had for its main object future letting, with special provisions applicable to existing tenancies. The word "existing" in sub-sect. 2 would have no substantive effect whatever if the subsection was confined to existing tenancies: *Haslett v. Sharman* (1) and *Vernon v. Pile* (2) treat the matter as clear. Sir George Vanston's note shows the understanding of the profession.

Sub-sect. 2 consists of two parts: a declaration (a) that the occupier shall not be "entitled" to deduct; (b) that any contract to the contrary respecting such deduction shall be void. It is an inversion of sect. 77 of the Poor Law Act, 1838, which was for the benefit of the occupier. Sub-sect. 2 may be probably explained by the object being twofold, to protect landlords from rates over which they had no control, and to make Local Government electors responsible for the fiscal action of their representatives. Before examining the provision, I will say something as to *malum prohibitum* and what is "*malum*."

There are many forms of statutory invalidity whether arising from breach of affirmative imperative enactments, implying prohibition, or from use of negative language. It does not follow that because a certain thing is prohibited it is made illegal as being *malum*. The object of the legislation must in each case be

(1) [1901] 2 I. R. 433.

(2) 35 I. L. T. R. 21.

K. B. Div. the guide, and it is material to consider whether such object is to protect individuals of a certain class or is founded on broad public policy affecting the State as a whole. Sect. 10 of Deasy's Act 1918. protect individuals of a certain class or is founded on broad public policy affecting the State as a whole. Sect. 10 of Deasy's Act and sect. 77 of the Poor Law Act, 1838, are of the former type. Sometimes the right is enforced by a penalty, as in the Income Tax Act, 1842, sect. 103. A subsequent contract may make good a sale expressly forbidden by the Sunday Trading Act, 29 Chas. 2, c. 7. The transaction itself may be forbidden, yet a collateral covenant attached thereto may be effectual, as in *Payne v. Mayor of Brecon* (1). An illustration will explain the distinction I am considering. If A agreed with B, his mistress, to pay her during illicit intercourse an annuity, no bargain, with knowledge, by C with A to indemnify him in respect of such annuity would be valid. On the other hand, a collateral agreement by a third person to pay in this case the occupying tenant's rates would be free from objection. So a collateral contract subsequently made by the landlord for value to pay his tenants' rates or a contract by the tenant on assignment of his tenancy to indemnify the assignee from rates would seem competent. What is there in sect. 52 to preclude the landlord at the time the tenancy is created from undertaking liability? Freedom of contract, particularly where one party foregoes an advantage to himself, ought not to be interfered with unless the intention of the enactment is certain and clear. The emphatic language of Lord Justice Buckley in *Tuff v. Guild of Drapers of City of London* (2) is relevant as to the principle. The cases hitherto as to invalidity of covenants for payment of property tax or tithes all relate to onerous divisible covenants imposing on the covenantor a liability which the covenantee was expressly by statute required to bear. Sect. 52 is the first instance where the burden was put on the occupier. It must be read in the light of the previous legislation such as the Poor Law Act in its original and amended form. The occupier is not "entitled" to deduct. This is the sole negative provision. The avoidance of a contract to the contrary is merely ancillary and would not, if it stood alone, preclude the landlord from undertaking to pay. What is forbidden is right to deduct. In a business sense, a bargain with a tenant that his maximum liability

(1) 3 H. & N. 572.

(2) [1913] 1 K. B., at p. 52.

for rent and rates should be a fixed sum was natural and proper. Since sect. 52 only one method could be suggested for carrying out that object, if legal. The method—that here adopted—would be by estimating rent and taxes at a fixed amount, the landlord undertaking to bear the rates, so that his profit rent would shrink if the rates rose. It is said that this would be an evasion of the Act. But there may be innocent evasion by keeping outside the statutory prohibition: *Simms v. Registrar of Probates* (1); *Bullivant v. Attorney-General* (2); *Ramsden v. Lupton* (3). Does the statute by necessary or reasonable intendment make such well-known course of dealing for the future unlawful? Whatever Parliament may have intended, I question if the language employed is sufficient to make such common and sensible contracts illegal. The main object was probably to relieve landlords from the burden of rates which might be imposed by the local authority elected by occupiers—an object for the protection of a class, just as sect. 77 of the Poor Law Act, 1838, was designed to benefit occupiers as a class. A special agreement by a landlord renouncing the benefit and undertaking to free the tenant would not frustrate such legislative intention. If an employer may lawfully agree to pay salary free of income tax, what is there in sect. 52 to prevent an owner from paying his tenant's rates in like manner? In the Tithe Act, 1891, c. 8, a broad question of public-policy was involved, the object being to remove an admitted grievance, Nonconformists, particularly in Wales, contrary to conscientious objection, having been compelled to pay by distress church tithes: *Woodfall, Landlord and Tenant* (12th ed.), p. 686. The drafting of that statute is unlike that of sect. 52, the apparent policy of which (to safeguard owners from increase of rates) cannot be extended by speculative inference so as to invalidate honest contracts in the reciprocal interests of owner and tenant. On the assumption, however, that my construction of sect. 52 may be incorrect, I now take up the other points argued.

4. If the contract, when made, was ineffectual, its invalidity was not such that it could not be made good by confirmation and estoppel. This element is found in the mortgage deed, which may

(1) [1900] A. C., at p. 334.

(2) [1901] A. C., at p. 202.

(3) L. R. 9 Q. B. 17.

K. B. Div. be treated as a collateral contract for value; no distinction was drawn between one rate and another, and the account was taken and passed accordingly. The contract was hall-marked as good during its continuance. A letting on its face valid but really intended between the parties for an immoral purpose would not support a contract by a third party knowing such illegal object to indemnify the tenant from rent or taxes. But violation of statutory conditions does not necessarily entail the same consequence. Thus the assignment of a lease contrary to sect. 10 of Deasy's Act is unlawful and void, but an express covenant for title in such prohibited assignment may be enforceable, as was the opinion of May C.J. in *Doody v. Nolan* (1). If a holding was sublet without the written consent of the landlord (without which such subletting is forbidden by sect. 2 of the statute of 1881), if the landlord had misled the sub-tenant as to such consent, he might be estopped; and the same result, as between the tenant and the sub-tenant, might follow if the former deceived the latter as to such consent having been given. The wide proposition attributed to Bacon V.-C. in *Barrow's Case* (2) is contrary to principle, and cases such as *Burkinshaw v. Nicholls* (3); *Barrow's Case* (2) on appeal, and many other authorities. In each case what is to be considered is the intention and reach of the prohibition. Thus a sale prohibited by 29 Ch. 2, c. 7, as being on Sunday and void does not support an action for price of the goods retained by the vendee; but though the sale is illegal, there may be an enforceable subsequent contract to pay such price: *Williams v. Paul* (4); *Simpson v. Nicholls* (5). Here the mortgage for value was founded on the landlord's accepting liability.

Res judicata is the highest form of estoppel. If a competent Court decides that a contract impugned as illegal for any reason is free from that objection, it cannot afterwards be impeached by a party on that ground. As to usurious contracts, the decisions of the Equity and Common Law Courts were in direct conflict: *Russell v. Daniel* (6); *Ex parte Warrington* (7); *Langton v.*

(1) 2 L.R. Ir. 199, at pp. 212, 213.

(2) 14 Ch. D., at p. 441.

(3) 3 App. C. 1004.

(4) 6 Bingham, 653.

(5) 3 M. & W. 240.

(6) 10 Ex., at p. 606.

(7) 3 De G. M. & G. 159.

Haynes (1); but though one or other of such views of statute law was certainly erroneous, the respective litigants were concluded by the unappealed judgments. The decision in the mortgage suit as to the five-sevenths (liability for the balance of the rates not being disputed) necessarily involved that the contract was binding. If the landlord's agreement as to poor rates was inoperative, and the tenant was liable for the whole poor rates, the special bargain that the tenant was to pay poor rates on five-sevenths was without effect. The judge never supposed that he was asked to determine an abstract academic question as to the effect of the special agreement, on a speculative hypothesis that such agreement, in fact void and illegal, was to be taken to be binding. The parties invoked the jurisdiction of the Court to decide legal contractual liability; it was an essential part of the judgment that on both sides the contract was legally enforceable. The accounts and subsequent consent order were on this foundation.

5. If the agreement as to rates was void but severable, it was held in *Daly v. Duggan* (2) and *Carolyn v. Brabazon* (3) that, in case of tithe, the Court could, in a specific performance suit, mould the lease in such a way as, avoiding the illegality disclosed in the apparent contract, would legitimately carry out the real intention of the parties. The latter case is cited in *Fry on Specific Performance* without question as an authority for the broad proposition. The method adopted was by adding the tithe, a fixed sum, to the rent, thereby increased over the contract figure. Can the principle be extended to this agreement as executory in relation to rates varying from year to year? A rent must be certain, but it may fluctuate in amount, governed by definite external conditions, just as tithe rent-charge now may be varied.

If a lease within the principle of the above decisions could be framed so as legally to give effect to the intention of the parties, the Court having all the materials before it, could without a suit for specific performance or counterclaim protect equitable rights in the same way as if it had directed a lease in appropriate form: *Mostyn v. West Mostyn Coal and Iron Company* (4); *Borrowes v.*

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(7) 1 H. & N. 366.

(8) 1 I. E. R. 311.

(9) 9 I. E. R. 224.

(1) 1 C. P. D. 145.

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My view on the other branches of the case makes it unnecessary to decide as to the applicability of Sir E. Sugden's method of relief; but if no other means of redress was available, I should be inclined to adopt it if it could avoid the nullifying operation of sect. 52.

6. Apart from *Haslett v. Sharman* (3) (where the objection was not taken), this is the first case where the action is founded on a contract, his side of which the plaintiff seeks to repudiate. In previous cases where the bargain was held severable the tenant was covenantor. It seems contrary to legal principle that a party to illegality should put money in his pocket by relying on his own breach of law.

The rent is a composite sum with which the rates are so interwoven that it seems difficult to separate them. No authority as to severability applicable to a contract so constructed has been cited. Further, in all the instances where the Court refused to give effect to a distinct covenant as unlawful, the covenantee who was suing got less than the deed on its face value would have given him; here the plaintiff would be getting more. That a party whose promise is part of the consideration should be allowed to subtract such part (by which the contract was induced) on the ground that it was unlawful, and thereby alter the contract in his own favour, putting the blame and loss exclusively on the other party, is a proposition not supported, as far as I know, by any authority hitherto, and seems opposed to common sense as well as to principle. As the point, though the Court called attention to it, was not dealt with in argument, and my opinion on the rest of the case makes a decision on it unnecessary, I only notice it lest it should be supposed to have been tacitly determined in the plaintiff's favour.

7. With regard to *Haslett v. Sharman* (4) and *Vernon v. Pile* (5), they cannot be regarded as concluding the present case. In the first place, the point was assumed by counsel and by the Court.

(1) 24 L. R. Ir. 503.

(2) 2 App. C. 439.

(3) [1901] 2 I. R. 433.

(4) [1901] 2 I. R. 433.

(5) 35 I. L. T. R. 21.

An objection overlooked cannot be taken to have been decided. *K. B. Div.*
 The authorities mentioned in my judgment in the *Hawth Case* (1) 1918.
 establish this.

Again, the decision that the tenancy was an existing tenancy would have been the same if the Court had declined to express any opinion as to the status of tenancies created after the Act of 1898 as not requiring to be then determined. An opinion either in favour of or against the validity of future contracts could not have affected the matter before the Court, and would therefore be obiter dictum.

Lastly, if part of the *ratio decidendi* of the Court in the registration cases was that the landlord's contract was valid, though *Haslett v. Sharman* (2) was not cited, and the point may have been insufficiently argued and considered, the law assumed in that case must be taken to have been erroneous on the judgment of the Registration Appeal Court. Even if that Court is for the purpose in hand to be regarded as a Court of first instance and not invested with appellate authority over the Divisional Courts, we cannot disregard the conclusion of judges of such learning and eminence. It certainly makes it impossible to accept *Haslett v. Sharman* (2) as a binding authority on the point not in that case requiring actual decision.

The question in the registration cases was as to the *bona fides* of the payment of rates. An affirmative answer might have been given though the contract by the landlord was not of legal obligation. A mistake of law would not prove *mala fides*. If *Mrs. Bradshaw* had paid the tenant's rates directly, the invalidity of the contract would not determine that the payment was otherwise than *bona fide*. In both the registration cases, however, the unlawful character of the contract might have been and apparently was relied on as relevant to the issue of *bona fides*. The date of the lettings in *Bryans v. Callaghan* (3) is not stated, but in the Irish Law Times report counsel is represented as having argued that sect. 52 invalidated the contract. The Court apparently treated the contract as effectual and *bona fide*, and only sent back the case for information as to its terms. In *Allen v. Carroll* (4) the lettings

(1) [1917] 2 I. R., at p. 475.

(2) [1901] 2 I. R. 433.

(3) 42 I. L. T. 97.

(4) [1911] 2 I. R. 190.

K. B. Div. were dealt with as made after 1898, and the invalidity of the
 1918. contract was pressed as a topic affecting bona fides. The Court
 BRADSHAW held that *Bryans v. Callaghan* (1) was a decisive authority. The
 v. judgment of Holmes L.J. represents what he took to be the ratio
 M'MULLAN. decidendi of the other members of the Court. They did not
 Gibson J. dissent in any way. A contract after the Act to pay the occupier's
 rates was held to be just as good as a similar contract previous to
 the statute. Unsatisfactory as the reports of these cases may be,
 dealing with a question widely affecting property, in this Court
 we ought to follow them; but I have expressed my own independent
 conclusions in case the law should have to be considered elsewhere.
 Sir George Vanston, in the second edition of his valuable work,
 treats the two cases as deciding that the contracts as to poor
 rates were valid:

MADDEN J.:—

In this case I unfortunately differ from the other members of the Court. I am of opinion that the contract of tenancy of the 1st of September, 1908, in so far as it purports to throw the burden of the poor rate on the lessor, violates the enactment contained in the 52nd section of the Local Government Act of 1898; and I am further of opinion that nothing that has taken place since the making of the contract has the effect, by way of estoppel or otherwise, of giving validity and effect, as between the parties, to the portion of the contract which has been declared void by an Act of Parliament.

The contract on which the action is founded is in the form of an accepted proposal for the letting of certain premises for the term of thirty-one years from the 1st of January, 1909, "at the yearly rent of £240, including all rates and taxes at present existing or assessed on the premises." It contains a clause by which the tenant proposed to pay five-sevenths of all future or increased taxation caused by the alterations and improvements thereafter stipulated.

The reservation of a yearly rent of fixed amount, "including rates and taxes," is a form of reddendum in common use. Speaking in general terms, it has the effect of placing the burden of taxation,

as between landlord and tenant, on the landlord. When considered in detail, it will be found to involve several distinct obligations. In the first place, it involves an obligation on the landlord to allow the tenant, when paying his rent, credit for payments made by him for taxes assessed upon or in respect of the demised premises. As the liability for poor rate falls on the occupier, this obligation is commonly enforced, as regards poor rate, by the deduction of the amount of this tax by the tenant from the rent when paid. The contract also involves an obligation on the landlord to save the tenant harmless from the burden of taxation, either by himself paying the taxes or by indemnifying from loss a tenant by whom they may have been paid. The right of the tenant is to deduct or to be indemnified. However it is described or worked out, the result of the contract is to place the incidence of taxation on the lessor. But having regard to the argument that has been addressed to us, it is necessary to keep distinct these two results of the contract: deduction and indemnification.

The first question for our consideration is whether, on the construction of the contract, poor rate is included in the rates and taxes with which it is conversant. The words "all rates and taxes as at present existing" are of the most comprehensive character; and I can find nothing in the contract to limit their application as between landlord and tenant. Such limitation is certainly not to be found in the words following, "or assessed on said premises." The argument on behalf of the defendant would be strengthened if the words were "and assessed," for this might indicate that only those taxes were included which were assessed on the premises, as distinguished from a personal impost like poor rate. But the use of the word "or" indicates that any effect which is to be attributed to these words must be by way of amplification and expansion, and not by restricting the meaning of the antecedent words. It is worthy of note that in the words dealing with the proportion of increased rates and charges which is to borne by the tenant the general term "taxation" is employed. The dealings of the parties throughout the case have been on the assumption that poor rate is included among the rates with which the agreement is conversant. For the reasons which I have stated,

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K. B. Div. I am of opinion that this is the true construction of the agreement, 1918. and I proceed to consider the case on this assumption.

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The first question that arises in the present case is that of the lawfulness of the agreement of 1st September, 1908, on the assumption that poor rate is included in the rates and taxes with which it is conversant. Such a contract would have been clearly valid before the passing of our Local Government Act.

It was an essential part of the system of local government, established in Ireland by the Act of 1898, that the rate to which the name of poor rate was given should be paid by the occupiers of hereditaments, and that these should devolve on them, with liability to the rate, responsibility in regard to its amount, and to administration. The 52nd section enacts that the poor rate shall be made upon the occupier and not upon the landlord of hereditaments. This enactment has two aspects—affirmative and negative; affirmatively it places the burden of the rate on the occupier, and negatively it prohibits the transferring of it to the landlord. The negative or prohibiting part of the enactment is developed in the 2nd sub-section, which is in these words:—"The occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor rate, and any contract to the contrary respecting such deduction shall be void."

The contract before us does not in terms declare the tenant entitled to deduct the poor rate from his rent. But as I have pointed out, a right of deduction follows as a necessary consequence from the contract. This being so, the contract is one "respecting deduction" within the words of the sub-section, and inasmuch as it is contrary to the enactment, that the occupier shall not be entitled to deduct poor rate from the rent, it is void. The Act does not render a contract of tenancy which contains such a provision absolutely void. It is avoided "respecting such deduction." I shall hereafter revert to this topic.

It is contended on behalf of the defendant that the contract in the present case is unaffected by sect. 52 in so far as it amounts to an undertaking on the part of the landlord to pay the rate, and to hold the tenant indemnified therefrom in consideration of the rent of £240. It is admitted that a tenant under such a contract could not lawfully deduct poor rate paid by him from

the rent, this being expressly forbidden by the statute; but it is contended that he is at liberty to enforce in any other way the liability to poor rate which the landlord has taken upon himself by the contract. If the section had stopped with the words "the occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor rate," it might be read as simply securing to the landlord payment of his rent in full, without deduction for poor rate. But it goes further. The language of sect. 52 is concise, but it is not on that account the less distinct and effective. It avoids in clear language not a contract which in terms entitles the tenant to deduct the rate, but any contract "respecting such deduction." These words, in my opinion, include a contract, like that in the present case, which, if it were legal, would entitle the tenant to deduct from his rent the amount of taxes paid by him which his landlord had contracted to pay, although it were in form an undertaking by the landlord to bear the burden of the rate.

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Such an enactment was necessary to carry out the paramount intention of the Legislature in regard to the incidence of the poor rate. So strongly was the general importance of this policy realized, that the incidence of the poor rate was placed on the occupier even in the case of tenancies existing at the passing of the Act.

To avoid the injustice which would be caused by the invasion without compensation of existing contractual rights, from motives of public policy, sect. 54 of the Act provided for the adjustment of rents under existing tenancies as between occupier and landlord, in consequence of the statutory change in the incidence of poor rate. Without going into unnecessary detail, it is sufficient to state that where the tenant is entitled under his contract of tenancy to deduct the poor rate, the rent is reduced by the whole of the appropriate standard amount of the rate which he is no longer at liberty to deduct. But as regards the incidence of liability to payment of the poor rate, the statute is of universal application, irrespective of the date of the creation of the tenancy.

A somewhat similar question to that in the present case arose under the English Tithe Rent Charge Act of 1891. By sect. 1 of the Act a contract between the occupier and the owner of land for the

K. B. Div. payment of the tithe rent-charge by the occupier was declared to be
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v. mode of collecting the tithe rent-charge, by payment to the tithe-
M'MULLAN. owner, or whether it dealt with the incidence of the rent-charge.
Madden J It was argued that there was nothing in the Act to avoid a contract
by which the occupier contracts to reimburse the owner in respect
of payments of tithe rent-charge which he may have to make, as
it is here contended that there is nothing in the Local Government
Act to avoid a contract like that in the present case by the land-
lord to reimburse the tenant the amount of poor rate paid by him
out of the increased rent which he contracts to pay. The Court
of Appeal in England held, Buckley L.J. dissenting, that the
statute dealt, in the words of Vaughan Williams L.J., "with
the incidence of the tithe rent-charge, and not merely with the
mode of collection."

The principle upon which this case was decided appears to be
applicable to the present case. What the Local Government Act
dealt with was not merely a particular remedy or proceeding by way
of deduction for the rent, but the broad principle that the respon-
sibility for the poor rate was placed upon the occupier, and any
contract between landlord and tenant the result of which would be
to shift this burden and impose it on the landlord was declared to be
void. I am therefore of opinion that any contract which has the
effect of changing the incidence of the burden of poor rate as between
landlord and tenant from that imposed by this section, is thereby
declared to be void, irrespective of the form of the contract, whether
it purports to authorize the tenant to deduct the poor rate when
paying the rent, or takes the form of a covenant by the landlord
to pay the poor rate, or an indemnity to the tenant against pay-
ment of the rate, or such an implied undertaking to keep the tenant
harmless as is involved in a letting at a bulk rent over and above
taxes.

As regards contracts after the passing of the Act, the parties
were at liberty to make their own bargains subject to the
provisions of the statute. It is obvious that the contractual
rent reserved in a letting which placed the entire burden of
the rate on the lessee would be less than the rent which the
lessee would have agreed to pay under a binding contract by

which the whole or part of the rate was to be borne by the lessor. A question as to the effect of a contract made under somewhat similar circumstances arose under the Tithe Composition Act of 1832 (2 & 3 Wm. 4, 119). The 13th section of this statute enacted, from motives of public policy, that "in future tenancies of land the lessee or tenant thereof shall hold such land free from the payment of tithes or composition for tithes, and all contracts, covenants, or agreements to the contrary hereof, howsoever made, shall be utterly null and void."

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The question of the legality of an agreement made after the passing of this Act, by which a tenant offered to pay £100 rent and an additional sum of £5 yearly in consideration of the tithes (which had then been converted into tithe rent-charge) being cast upon him, came before Lord St. Leonards when Sir Edward Sugden C. The contract was in fieri, and it was argued that to grant specific performance of such a contract would enable the parties to evade the provisions of an Act of Parliament; and it is evident that Sir Edward Sugden felt some difficulty in the matter, for in a subsequent case—*Carolan v. Brabazon* (1)—in which it became necessary to decide the point, having referred to certain decisions and the intimation of his own opinion, which will be found in *Davis v. Fitton* (2), he said—"Where there is an agreement to make the tithe rent-charge payable by the tenant and the agreement rests in fieri, the Court may, in favour of the intention, and without being liable to the imputation that it is permitting an evasion of the Act, add the amount of the rent-charge to the rent, as the landlord himself might have done, and so give to each party what he contracted for. I shall follow these authorities, which I am not prepared to overrule; but though I have expressed an opinion the same way, I am not inclined to carry the doctrine further."

We are asked in the present case to carry the principle of this case further, and to apply it to a state of facts which is essentially different. In the first place, the agreement between the parties in this case does not rest in fieri. It is factum. This is the effect of the 4th section of our Landlord and Tenant Act of 1860, by which a note in writing signed by the landlord is as effective in creating

(1) 3 Jones & Latouche, at p. 212.

(2) 2 Dr. & War., at p. 236.

K. B. Dir. a. tenancy as a deed under seal. I doubt that a Court of Equity
 1918. would entertain a suit for specific performance for the purpose of
 BRADSHAW substituting one form of contract for another which the Legislature
 v. has declared to be equally effective; but if it were to do so,
 M'MULLAN. I am of opinion that it would embody in the deed the agree-
 Madden J. ment on which the action was founded, and not another
 and a different one. Sir E. Sugden in the cases cited gave
 effect to the intention of the parties as expressed in an agree-
 ment that was in itself lawful. In the present case there was no
 evidence of any intention on the part of the parties other than
 that embodied in the agreement. I cannot see that the defen-
 dant's case derives any assistance from the cases before Sir E.
 Sugden. On the contrary, Sir E. Sugden stated that he was not
 inclined to carry the doctrine upon which he acted further. This
 would be so, if he had directed the execution of a deed which was
 in accordance neither with the expressed intention of the parties
 nor with the general policy of the Act of Parliament.

It is said that the lawfulness of a contract under which the
 landlord agrees to pay the poor rate has been established
 by decisions of the Court of Appeal in two cases: *Bryans v.*
Callaghan (1) and *Allen v. Carroll* (2). These cases were concerned
 with the title to the franchise of the tenants of artizans' dwellings of
 which the Armagh Urban District Council were landlords; and in
 each case the question was whether the rates were "bona fide"
 paid by the applicant within the meaning of the Representation of
 the People Act, 1867, sect. 3. This was a question of fact. It
 appeared that in each case the house occupied by applicant was
 held at the yearly rent of £31, free of rates, and the payment of
 rates, the bona fides of which was in dispute, was made by the
 landlords. In each case the Revising Barrister found as a fact
 that the rates were bona fide paid by the council, and in each case
 his decision was upheld by the Court of Appeal.

The fact that the contracts of tenancies cast the burden of
 rates upon the landlord was a material one for the consideration
 of the Court. If it had come to the conclusion that the agreement
 was a colourable one, made with a view to the manufacture of
 votes, this would have been an important, if not a conclusive,

(1) 42 I. L. T. R. 97.

(2) [1911] 2 I. R. 190.

consideration on the question of the bona fides of the payment. But if the contract of tenancy was an honest one between landlord and tenant, I cannot see how the character of the payment, as a qualification for the franchise, would be affected by the question of the liability to the rates of the landlord and tenant inter se under the provisions of the Local Government Act. That this was the view of the Court of Appeal appears from the refusal of the Court to remit the case to the Revising Barrister for a direct finding of fact as to the date of the lettings. In *Bryans v. Callaghan* (1) the letting was before the Local Government Act, and no question could arise as to the validity of such an agreement. In *Allen v. Carroll* (2) the date of the letting was not proved. When Holmes L.J. in the latter case said that the Court could not come to the conclusion that the contract in *Bryans v. Callaghan* (1) was a "valid" one, and came to the same conclusion as regards the contract in *Allen v. Carroll* (2), I conclude from the language used by him that he meant by the word "valid" an honest letting, which was the basis of a bona fide payment of rates, and not a colourable one made for the purpose of manufacturing votes. The question of the legality of the contract in *Bryans v. Callaghan* (1) under the Local Government Act could not have been the issue, having regard to its date. That the honesty of the contracts and not their lawfulness under this statute was the matter present to his mind seems to follow from his reference to the conduct of the council—a topic which would appear to be irrelevant if he were considering the legality of the contract, having regard to the provisions of the Local Government Act. He says that "the action of the urban council was correct in reference to the contract. Here we have a precisely similar contract, with the same line of action taken by the council; and it is, therefore, impossible for us to come to a different conclusion in this case from what the Court arrived at in *Bryans v. Callaghan*" (1). The concluding words of his judgment, in which he says that no distinction could be taken between the cases founded on the terms of letting, further satisfies me that a ground of distinction in which these dates would be of importance was not present to his mind.

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(1) 42 I. L. T. R. 97.

(2) [1911] 2 I. R. 190.

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From the reports of these cases I should have been satisfied that no such question as that in the present case arose for the decision of the Court of Appeal, even in the absence of the following passage from the judgment of the Lord Chief Justice, who was counsel in the cases, and who must be credited with an accurate appreciation and recollection of the point of the decision of the Court:—"It may be that in the shifting currents of the Irish decisions under these Franchise Acts, *Allen v. Carroll* (1) may be supported upon the assumption that in the opinion of the Court the question as to the legality of the contract of letting did not arise in the absence of any findings as to the date of the letting, and that the sole question was as to the bona fides of the payment of the rates."

I have come to this conclusion with satisfaction, not on account of the opinion which I have formed in the present case, but because a decision of the Court of Appeal in favour of the validity of such a contract would be at variance with the view of the effect of sect. 52 of the Local Government Act adopted by this Court in the case of *Haslett v. Sharman* (2), to which I was a party. The question for decision in that case was whether a certain contract was an "existing tenancy" at the date when the Act came into operation. My brother Gibson, in delivering the judgment of the Court, says:—"If this contract did not constitute an 'existing tenancy' on the 1st of April 1899, any substitution shifting the burden of poor rate from the occupying tenant on the landlord would be void under the Local Government (Ireland) Act, 1898, sect. 52, sub-s. 2." The question upon which the present case turns was not raised, and therefore it comes before the Court for decision for the first time in the present case. For myself, after the full argument which we have heard, I am satisfied to adopt as an expression of my considered opinion the passage which I have quoted from the judgment of the Court in *Haslett v. Sharman* (2).

If I be right in the conclusion at which I have arrived, it would not have been possible for the tenant under the agreement of 1st September, 1908, when sued for the first gale of rent accruing due after its execution, to pay into Court the amount of

(1) [1911] 2 I. R. 190.

(2) [1901] 2 I. R. 433.

the rent, less the poor rate which the lessor had undertaken to pay, and successfully to defend the action. The question arises, has anything occurred since then to put the parties in a different position in regard to the rent with which the present action is conversant?

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Many things have occurred which are set forth in the statement of defence, the effect of which is thus pleaded:—"The defendant further says that the plaintiff is now estopped by the decision of the Master of the Rolls, by the consent mentioned in paragraph 12, and by the drawing out of Court of the money mentioned above, from denying the right of the defendant to credit for the rates and taxes paid by him in this action, and from claiming that the amount of rent payable to her is not at the rate of £240 per annum, less by the amount paid by lessee for rates and taxes."

In dealing with the question of estoppel raised by the defence I adopt the definition in Lord Halsbury's Laws of England: "There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not."

I asked Mr. Jellett to formulate the proposition which the plaintiff is estopped from asserting in the present action. He did so in these words: "that the agreement of 1908 is void under sect. 52," adding that the plaintiff was estopped from making this case by matter of record and also by conduct. I shall deal separately with these branches of his case. But, in the first instance, the question arises: can a party be estopped from relying on an Act of Parliament? The following passage occurs in the judgment of Bacon V.-C. in *In re Stapleford Colliery Company (Barrow's Case)* (1):—"But the doctrine of estoppel cannot be applied to an Act of Parliament; estoppel only applies to a contract inter partes, and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament." The decision of the Vice-Chancellor was reversed on appeal. But his error lay, not in the general principle which he laid down, but in applying it to the facts of the case before him. The estoppel which was held good was not in the face of

(1) 14 Ch. Div. 432.

K. B. Div. an Act of Parliament, in the sense of contradicting the statute, or
 1918. giving validity to a contract which it declared to be void, but as
 BRADSHAW to the existence, in fact, of conditions which had been prescribed by
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Barrow's Case (1) arose on the 25th section of the Companies Act of 1867, which enacts that every share in a joint-stock company shall be taken to have been issued subject to the payment of the whole amount thereof in cash, unless the same should be otherwise determined by a contract in writing filed with the Registrar of Joint-Stock Companies at or before the issue of the shares. What is here rendered illegal is not the issuing of shares as fully paid, on which no money has, in fact, been paid, but the issue of such shares without filing a document in the proper office from which information would be given to the public that the directors had taken this course. In *Barrow's Case* (1) the shares were issued as fully paid-up shares, without the registration of the document in writing required by the statute. The Court of Appeal held, reversing the decision of Bacon V.-C., that the company was estopped by the act of their directors from relying on the provisions of the 25th section as against holders of the shares for valuable consideration without notice. The Lord Chief Justice says:—"I cannot read the judgment of Jessel M.R. in any other sense than as a decision that the doctrine of estoppel did apply as against the company, even though there had been a failure to comply with sect. 25 of the Companies Act, 1867"; and this is the view of the decision taken by Buckley L.J. in the last edition of his work on the Companies Acts, which was revised by the author.

The estoppel to which effect was given in that case was as to a matter of fact—compliance with certain statutory requirements. In the present case it is as to a matter of law—the validity of a contract which, on the hypothesis on which this branch of the case proceeds, has been declared void by Act of Parliament.

In support of the proposition that the plaintiff is estopped by matter of record from relying on the statutory avoidance of the contract, Mr. Jellett relies on the proceedings before the Master of the Rolls and in this Court. Those proceedings have been so

fully stated that I need only summarize the result, and consider its relevance to the question before us. Stating the result in the most favourable way for the defendant, it amounts to this: The plaintiff was party to proceedings before the Master of the Rolls and in this Court, in which it would have been relevant to the ascertainment of the amount of the liability of the defendant under the contract to raise the question of the invalidity of the agreement on the part of the lessor to pay the poor rate; the plaintiff deliberately abstained from so doing; and the order of the Master of the Rolls and of this Court was based on the assumption that the lessor was bound to pay the poor rate. The question of the lawfulness of this contract was not discussed or considered by the Court on either occasion; but the plaintiff is none the less estopped by matter of record from disputing the decision in either of these cases. If the validity of the contract had been the ground of the decision in this Court, we should have been bound by it, and if it had been decided by the Master of the Rolls, we should have followed his decision as an authority. But the fact that this question was not raised on either occasion, while it deprives the adjudication of value or weight as an authority, does not prevent it from acting as an estoppel, being a decision *inter partes* in the particular case before the Court.

But Mr. Jellett goes further, and he relies on these orders as estopping the plaintiff from raising the question in the present action. Assuming for the purpose of this branch of the argument that the contract as to poor rate is void under the statute, I am of opinion that the failure of the plaintiff to raise this question in an action conversant with certain earlier gales of rent does not preclude him, by estoppel or otherwise, from relying on it in an action relating to a subsequent gale of the rent. I am not aware of any decision on the point, but we derive assistance from the judgment of the English Court of Appeal in *Humphries v. Humphries* (1). That was an action for arrears of rent under an agreement for a lease. The defendant raised the defence that there was no memorandum or note in writing to satisfy the requirements of the Statute of Frauds. It appeared that in a former action based on antecedent arrears of rent the defendant had not

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(1) [1910] 1 K. B. 796.

K. B. Div. 1918. *BRADSHAW v. M'MULLAN.* *Madden J.* raised a defence founded on the statute, and that judgment had been given against him. It was held that the defendant, not having raised this defence in the former action, was estopped from raising it in the second action. The principle of this decision appears from the judgment of Farwell L.J., in which he adopts the law as stated by Williams J. in *Howlett v. Tarte* (1)—“If the defendant (to a second action) attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel.” The estoppel in that case was as to a matter of fact—the existence of a note in writing.

It is, to my mind, evident from the judgment of Farwell L.J., and the reasoning on which it is founded, that his decision would have been different if the estoppel had related to a proposition of law similar to that formulated by Mr. Jellet. The estoppel in such a case would be, in the words of Bacon V.-C., in the face of an Act of Parliament.

Mr. Jellet argues that even if the legal principle of estoppel does not govern the case, it would be inequitable to allow the plaintiff now to raise the question of the invalidity of the rate having regard to his continuous course of conduct. If this conduct had resulted in altering the position of the defendant for the worse, I could understand its being relied on as the foundation of a personal equity, affecting the conscience of the plaintiff and disentitling him to insist on his strict legal right. But when this course of conduct is examined, it is simply permitting the defendant to retain money of the plaintiff to which he had, *ex hypothesi*, no legal right. This course of conduct may have naturally given rise to an expectation of its continuance; but such an expectation, however reasonable, cannot supply the foundation of the action of a Court of Equity, in the absence of consideration or of something injuriously affecting the position of the party who relies on it.

The 52nd section of the Local Government Act avoids not the whole contract of tenancy, but the contract “respecting such deduction.” The case of *Gaskell v. King* (2) is an authority for the proposition that the statutory avoidance of a particular covenant in

(1) 10 C. B. (N. S.) 813, at p. 826.

(2) 11 East, 165.

a lease does not avoid the entire lease, and that the rent is recoverable. *K. B. Div.*
 In that case the illegal covenant was, as a matter of conveyancing, 1918.
 "distinct" from the rest of the contract, which was by deed, and *BRADSHAW*
 it is so described by Lord Ellenborough C.J. in his judgment; but *v.*
 the principle of the decision would apply where the unlawful con- *M'MULLAN.*
 tract is separable from the remainder of the agreement. In a case Madden
 like the present the separable character of the unlawful agree-
 ment as to poor rate appears to me to follow from the limited
 application of the 52nd section, which involves a separate con-
 sideration of the contract of tenancy as a whole, and the particular
 part which is conversant with deduction of poor rate, and which is
 declared to be void.

For these reasons, I am of opinion that the judgment in
 favour of the plaintiff should be affirmed.

KENNY J. :—

In the view I take of this case it is unnecessary, as it seems to
 me, to express an opinion on several of the very difficult questions
 that have been argued before us, as in my judgment—differing on
 this point from the opinion of my brother Madden—the registra-
 tion cases in the Court of Appeal are conclusive authorities in
 favour of the defendant, to which effect should be given in this
 Court. At the same time I am not to be taken as dissenting
 from the conclusions at which my brother Gibson has arrived or
 his reasons for such conclusions. In the first of these registration
 cases, *Bryans v. Callaghan* (1), the appeal raised the point as to
 whether the respondent Callaghan was in occupation of premises
 as an inhabitant householder. The urban district council occupied
 a double position; they were the rating authority and also the
 landlords of the premises. Their predecessor in title had made
 lettings, of which Callaghan's tenancy was one, on the terms that
 the rent payable should include the poor rate—in other words,
 that the landlord should pay the rate. It was not made quite
 manifest in the "case stated" for the Court of Appeal whether
 Callaghan's tenancy was one existing at the date of the passing of
 the Local Government Act or had come into being subsequently,
 but in my opinion it is reasonably clear that it was created

(1) 42 I. L. T. R. 97.

K. B. Div. subsequently. Sect. 52, sub-s. 2, of the Local Government Act 1918. was relied on in argument, and could only have been relevant in the case of a contract not in existence at the passing of the Act.

BRADSHAW v. M-MULLAN. If the Court were dealing with a contract in existence when the Act passed, a different question might have arisen, and sect. 52, sub-s. 2, would have been inapplicable. The rent in such a case would have been an adjusted rent under sect. 54, and no question of illegality could have arisen, as there is no restriction on freedom of contract in connexion with adjusted rents under that section. The Court had then to determine whether in the circumstances the payment of the poor rate by the landlord pursuant to the contract with the occupier was a bona fide payment under sect. 3 of the Representation of the People Act, 1867. If it were affected with illegality, it was contended—and indeed not denied—that it could not be held to be a bona fide payment. The Court held the payment was a bona fide one, and in doing so must, in my opinion, be regarded as having decided that the contract by the landlord for payment of the rates was not rendered illegal by the subsection.

The second case—*Allen v. Carroll* (1)—seems to me to be not only a very distinct authority in favour of the legality of the contract in question, but to demonstrate that the construction of sect. 52, sub-s. 2, was involved in and was in fact the ratio decidendi in *Bryans v. Callaghan* (2). Whatever doubt may have existed as to the date of the letting in the latter case, it is quite clear that the tenancy in *Allen v. Carroll* (1) was created after the passing of the Local Government Act of 1898, inasmuch as the clerk of the urban council who made the letting on behalf of the council was not, as appears from the uncontroverted statement of counsel, appointed as clerk until 1903. In all other respects, as pointed out by Holmes L.J., the case was similar in its facts to *Bryans v. Callaghan* (2). The argument addressed to the Court was that the rates were not bona fide paid—that the tenancy was created subsequently to the Local Government Act—that sect. 52, sub-s. 2, rendered illegal the contract for payment of the rates by the landlord, and that such illegality vitiated the payment and precluded it from being regarded as bona fide. For the claimant

(1) [1911] 2 I. R. 190.

(2) 42 I. L. T. R. 97.

to the franchise it was submitted that the case was concluded by *Bryans v. Callaghan* (1) on the ground that a similar question of bona fides was there raised on a similar contract and with regard to similar premises. Lord O'Brien L.C.J. thought that there was no substantial distinction between the two cases. Holmes L.J. concurred, observing that "in *Bryans v. Callaghan* (1) the Court came to the conclusion that the contract was a valid contract." He goes on to say that the only suggested distinction between the two cases was the time of the letting; and he then adds: "But even assuming that the lettings in *Bryans v. Callaghan* (1) were made before 1898, which was not relied on in the argument therein, I fail to see how that would make any difference in the position." I take that observation to mean that in *Bryans v. Callaghan* (1) the case proceeded on the basis that the lettings were made after the Local Government Act of 1898, and that the contract might be open to the objection of illegality as the result of sect. 52, sub-s. 2, but that the Court overruled that objection, and held that the contract was not illegal under the subsection, and that consequently the payment of the rates was bona fide, but that even if the case proceeded on the basis of the letting before the Local Government Act the position in result would be the same. It seems to me that it is apparent from the Lord Justice's language that sect. 52 and the effect of it were considered by him. He in substance decides that the contract if made before the Local Government Act would be a valid one, because at that time no element of illegality could enter into the transaction, and that, if made after the Local Government Act, it was valid notwithstanding sect. 52, sub-s. 2. I am unable to read this judgment as being other than a declaration in favour of the legality of such a contract as the plaintiff here entered into in the agreement of September, 1908.

It is noticeable that in neither of these registration cases was the decision of this Court in *Haslett v. Sharman* (2) referred to. The judgment of the Court in that case was delivered by my brother Gibson, who expressed the opinion—which would seem to have been in the nature of an obiter dictum—that any stipulation shifting the burden of poor rate from the occupying tenant to

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(2) [1901] 2 I. R. 433.

K. B. Div. the landlord would be void under sect. 52, sub-s. 2; and it is
 1918. somewhat surprising to find that this authority was not cited in
BRADSHAW the Court of Appeal. The omission to do so cannot affect the
v. binding character on this Court of the decisions in the latter
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I am of opinion that judgment should be entered for the defendant.

Solicitors for the plaintiff: *Smyth & Sons.*

Solicitor for the defendant: *James Dickie.*

A. E. C.

Appeal. IRISH CATHOLIC CHURCH PROPERTY INSURANCE
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Revenue—Excess Profits Duty—Employers' Liability Insurance—“Where the principal business consists in making investments”—Investment Reserve Fund—Capital—Appropriations from profits to meet depreciation in securities—Allowance—Computation of profits—Finance (No. 2) Act, 1915, Schedule IV, Part I, Rule 8; Part III, Rule 2.

A company carrying on a fire insurance and employers' liability insurance business is not, for the purposes of the Computation of Excess Profits Duty, a company whose “principal business consists in making investments”; its accumulated profits which have been invested and form a reserve fund cannot be treated as capital employed in the business; and there being no statutory obligation on a limited company to replace capital lost by depreciation in securities, such a company is not entitled to an allowance out of profits for the sums set aside to make good such depreciation.

APPEAL from an order of the King's Bench Division, dated January 14th, 1918, affirming the determination of the Commissioners for the Special Purposes of the Income Tax Acts, on an appeal by the Irish Catholic Church Property Insurance Company against assessments to excess profits duty made upon them under the Finance (No. 2) Act, 1915, Part III, for two accounting periods of one year each, ended respectively 31st December, 1914, and 31st December, 1915.

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

The case stated was as follows:—

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1. The company is a company incorporated under the Acts relating to companies, and carries on a fire insurance and employers' liability insurance business in Dublin. The company's capital is divided into 20,000 shares of £5 each, of which £1 per share has been paid up.

2. Prior to the passing of the Employers' Liability Insurance Companies Act, 1907 (7 Edw. 7, c. 46), the company carried on a fire insurance business only, but after the passing of that Act it decided to undertake also the business of employers' liability insurance, and from 1st July, 1908, it has carried on such business in accordance with the requirements of the Act.

3. For the purpose of undertaking such business and before it could commence business, it was necessary for the company, under the provisions of the said Act and of the Acts relating to life assurance, companies which were thereby made applicable to employers' liability insurance as carried on by the company, to deposit and invest, and the company did deposit and invest, a sum of £20,000 in approved securities under the control of the Court of Chancery. The said sum of £20,000 was provided by the company as to one-half out of its then existing accumulated profits and investments, and as to the other half by means of a call upon its shareholders for the sum of 10s. per share. The said call made the total of £1 which has been paid up on each share of the company.

4. In compliance with the provisions of the Acts relating to life assurance companies, the profits or loss arising from the company's fire insurance business and employers' liability insurance business is shown separately in the company's accounts, in the form prescribed, and a separate fund for each purpose has been constituted and is shown in the company's balance sheets, but, for the purpose of the assessments appealed against, the two accounts and two funds have been dealt with as one account and one fund, and no question arises in this case by reason of the separation of the accounts and funds referred to.

5. Prior to the year 1908 the company had accumulated in previous years a reserve fund of £8474 4s. 7d.

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For the year 1908 and subsequent years down to the date of this appeal the company made out of its yearly profits the following additions to the said reserve fund:—For the year 1908 an addition of £1860 16s. 6d.; 1909, £2243 18s. 1d.; 1910, £1635 16s. 7d.; 1911, £2644 4s. 7d.; 1912, £1907 8s. 3d.; 1913, £1902 14s.; 1914, £3113 4s. 10d.; 1915, £2186 9s. 6d. Total, £25,968 16s. 11d.

6. The said total of £25,968 16s. 11d. agrees with the amounts shown in company's balance sheet for the year 1915 under the headings "Fire Insurance Fund," "Employers' Liability Insurance Fund," and "Investment Reserve Fund." The said funds are available for the purpose of the company's business as reserve funds, to be used in the contingencies for which they have been provided, and they have been accumulated for the further protection of policy-holders, and for the greater security of the company's business and capital; and as regards the investment reserve fund in compliance with the direct requirements of the law as set out in the next succeeding paragraph.

7. Under the requirements of the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), sect. 4, the company is required to make such provision in its balance sheet for any reduction in value below the purchase price of any investments of which it is the owner as will enable the persons signing the balance sheet to certify that in their belief the assets set forth in the balance sheet are in the aggregate fully of the value therein stated, less any investment reserve fund taken into account. The company has under these requirements accumulated out of its profits the provision shown in its balance sheet at 31st December, 1915, the said investment reserve fund being part of the total accumulated funds amounting to £25,968 16s. 11d.

8. All sums received by the company, except such sums as may be required for the immediate purposes of the business, are as soon as may be invested by the company. All investments made by the company are authorized by the directors, and carried out by the secretary.

9. The business of the company is carried on from its office in Dublin. The company has no agents and pays no commission, but transacts its business with its policy-holders through the post

or at its office. The company employs eleven persons, and deals annually with approximately 4000 policy holders, some of whom hold more than one policy. At the time of the hearing of the appeal the present risks insured by the company exceeded £12,000,000.

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10. The assessments appealed against were computed and made by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III, by reference to the profits of the company as shown in its published accounts, but excluding altogether from the computation both all the income received by the company on its investments, and all the capital and accumulated profits represented by such investments. Such exclusion was founded on Rule 8 of Part I of Schedule IV, and Rule 2 of Part III of the same Schedule of the Act.

11. In these circumstances, counsel (S. L. Brown K.C.) contended on behalf of the company—(a) That the company should be treated as a company carrying on a business “where the principal business consists in making investments” within the Finance (No. 2) Act, 1915, Schedule IV, Part I, Rule 8. (b) That the accumulated profits of the company which had been invested should be treated as capital of the company employed and jeopardized in the business, notwithstanding anything in Part III of the same schedule. (c) That in view of the fact that as practically all the capital and all the accumulated profits of the company were invested, the exclusion of investments would deprive the company of its entire capital for purposes of excess profits duty computation; and (d) That allowance should be made out of the profits for the sums set aside from time to time to make good the depreciation in the value of the securities, as required by the Assurance Companies Act, 1909.

12. The Surveyor of Taxes, Mr. R. Walker, on behalf of the Commissioners of Inland Revenue, opposed these contentions.

The Commissioners who heard the appeal determined that the principal business of the company was not the making of investments, and that its investments were not employed in the business within the meaning of Part III of the schedule referred to. They accordingly confirmed the assessments.

They stated a case for the opinion of the High Court; and the

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King's Bench Division (Sir James H. M. Campbell C.J. and Gibson and Gordon JJ.) held that the determination of the Commissioners was not erroneous in point of law, there being evidence justifying the inferences of fact on which it was arrived at. From this decision the company appealed.

Henry K.C. and S. L. Brown K.C. (with them Hugh Kennedy),
for the appellants :—

The effect of the Employers' Liability Insurance Act, 1907 (7 Edw. 7, c. 46), is to put the appellant company on the footing of a life insurance company. Sect. 1 enacts that the provisions of the Life Assurance Companies Acts, 1870 to 1872, relating to life assurance companies, shall apply to every company which carries on the business of insuring employers against liability to pay compensation or damages to workmen in their employment. The Assurance Companies Act, 1909 (9 Edw. 7, c. 49), is made applicable to companies undertaking employers' liability insurance; and under this Act every assurance company shall deposit and keep deposited with the Paymaster-General the sum of £20,000. The total reserve of the appellants consists of that £20,000 and £25,968, accumulated out of yearly profits.

The basis of the excess profits duty is the pre-war profits standard. This standard is arrived at by taking the average of any two of the three last pre-war trade years to be selected by the taxpayer; and if the profits of any accounting period exceed that standard, 50 per cent., now 80 per cent., of the excess is payable in duty. If it is shown to the satisfaction of the Commissioners of Inland Revenue that the amount of the profits standard, ascertained as aforesaid, was less than the "percentage standard," the pre-war standard of profits shall be taken to be the percentage standard: Finance (No. 2) Act, 1915, sect. 40, sub-s. 2. The statutory percentage was 6 and now is 9 per cent. on the capital of the trade or business as existing at the end of the last pre-war trade year. In this case the percentage standard was taken.

We submit that the income derived from the reserve fund of the company should be taken into account in arriving at the profits; that the appellants come within the exception contained in Schedule IV, Part I, Rule 8, of the Finance (No. 2) Act, 1915.

This rule provides—"In estimating the profits no account shall be taken of income received from investments except in the case of life assurance businesses and businesses where the principal business consists of the making of investments." The appellant company is, for the reasons already given, a company carrying on a life assurance business, or if not, it should be treated as a company whose principal business consists in making investments, and for the purpose of determining the pre-war percentage standard the accumulated profits which had been invested should be treated as capital employed in the business. Assuming that the appellants come within Rule 8, above mentioned, Rule 2 of Part III of Schedule IV, which says that "any capital the income on which is not taken into account for the purposes of Part I of this schedule . . . shall be deducted in computing the amount of capital" is not applicable. The business could not have been begun or carried on if the statutory deposit of £20,000 had not been made; and although this sum, together with the £25,968, is invested in outside funds or stocks, it is none the less employed in the business, because without such a reserve the financial stability of the enterprise could not be maintained, and instead of showing a profit its operations might result in a loss.

An allowance should be made out of the profits of the accounting period for the sums set aside to make good the depreciation in the value of securities.

Under sect. 4 (c) of the Assurance Companies Act, 1909, and note 3 to the Third Schedule of the Act, the company is bound to make provision every year for depreciation in its investments; and there can be no distribution of profits amongst the shareholders until enough has been set aside to meet depreciation. If there had been no war and no excess profits duty the profits would have been distributed after the appropriation of funds out of the earnings to make good the loss caused by the fall in the value of securities. Where capital has been increased during the accounting period a deduction shall be made from the profits of the accounting period at the statutory percentage on the amount by which the capital has been increased: sect. 41, sub-s. 1, of the Act of 1915. We claim the benefit of this deduction in respect of the sum set aside from the profits of the year, and invested for the purpose of

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maintaining the value of the reserve fund investments, including the securities constituting the statutory deposit.

Serjeant Sullivan K.C. (with him *G. W. Shannon*), for the respondents:—

In the Assurance Companies Act, 1909, sect. 1, life insurance business is defined as “the issue of or the undertaking of liability under policies of assurance upon human life, or the granting of annuities upon human life.” That is not the business upon which the appellants are engaged; and, on the facts, it cannot be maintained that the principal business consists of the making of investments.

There is no statutory obligation on the company to make provision for loss sustained in the capital value of investments through depreciation in securities. The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), First Schedule, Table A, sect. 99, simply provides that the directors “may,” before recommending any dividend, set aside out of the profits of the company, such sums as they think proper as a reserve or reserves, which shall, at their discretion, be applicable for meeting contingencies or for equalizing dividends, or for any other purpose to which “the profits of the company” may be properly applied, and, pending such application, may, at the like discretion, either be employed in the business of the company, or be invested in such investments (other than shares of the company) as the directors may from time to time think fit. Manifestly, accumulated profits invested, as in this case, by the appellants in the business of someone else cannot be regarded as capital employed by them in their own business. Surplus earnings appropriated to particular purposes in compliance with a private Act of Parliament are liable to income tax: *Mersey Docks v. Lucas* (1).

SIR IGNATIUS J. O'BRIEN C.:—

It may or may not have been foreseen by the framers of this Act of Parliament that cases like the present would have to be dealt with in a manner that might result in hardship, as undoubtedly the result will, as it seems to me, often press more

severely on the company which carries on its business honestly and fairly in a way calculated to give the maximum security to those relying upon it—and the appellants have shown that they have prudently and wisely created an investment reserve fund which maintains the security of those dealing with the company—than on companies which divide all the profits amongst the shareholders, thus rendering their financial position less stable; but from the legal standpoint I cannot, I am sorry to say, see any way for the appellants out of the situation that has arisen.

The addition to the reserve fund made out of profits in this case had down to the year 1915 amounted to £25,968, and in the year 1915 the amount carried to the credit of that fund was £2186. What do the moneys carried to that fund represent in any particular year of trading? Taking 1915, the sum of £2186 was beyond all doubt part of the profits of that year. If it is profit, the ordinary law, so far as I can see, does not contain anything in the nature of a prohibition against the distribution of all that money amongst the shareholders, even though as a matter of good business it is quite proper and necessary, by an addition to the reserve fund, to make provision for depreciation in securities.

It has been argued that, not in the case of an ordinary company, but in that of this particular company, a statutory obligation is imposed upon the directors to make provision out of profits for the market depreciation in the investments representing the reserve fund. If I found in express terms or by reasonable implication such a provision in any statute, I should hold that profits for the purpose of distribution could not be estimated until such a deduction had been made; but although such provisions are not unknown in statutes, none of the Acts to which we have been referred imposes upon the appellants the obligation to which they say they are subject.

What the appellants chiefly rely upon is note 3 to the third schedule to the Assurance Companies Act, 1909. That note prescribes the form of the balance-sheet. It says:—"The balance-sheet must state how the values of the Stock Exchange securities are arrived at, and a certificate must be appended, signed by the same persons as sign the balance-sheet, to the effect that in their belief the assets set forth in the balance-sheet are in aggregate

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Appeal. fully of the value stated therein, less any investment reserve fund
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The effect of the note is that the market value appears on one side of the balance-sheet, and that on the other side figures are given showing the amount of the investment reserve fund; but that does not get us any nearer to the suggested statutory obligation that what are profits, and would appear as such in the profit and loss account, cannot legally be divided amongst the shareholders until a sum has been set aside to meet depreciation. The form of certificate prescribed by the schedule does not, so far as I can see, create the obligation which it has been argued by the appellants does exist; and, accordingly, I am of opinion that the excess profits duty in this case will have to be assessed on the profits, without making any allowance for the sum set aside to make good the depreciation in the value of securities. There is really no practical difference between the reserve fund and the £20,000 which the company was bound to deposit, because it is entitled to take the latter at its nominal value.

I regret very much the conclusion at which I am forced to arrive. I should have wished the law were different, because it would then be more satisfactory from the point of view of the security of the members of the public who approach companies of this kind to effect insurance. The law sometimes requires harsh things to be done, and this case is to a certain extent an illustration of that principle. We cannot, however, alter the law. That is the function of the Legislature.

As regards the question that the appellants should be treated as a company whose principal business consists in making investments, the order of the Court below is clearly right, and must be affirmed.

RONAN L.J. :—

The last point referred to by the Lord Chancellor, namely, that the principal business of this company, whose insurance risks exceed £12,000,000, is an investment, and not an insurance business, seems to me unarguable. Almost the entire argument

of the appellants in this case was based upon note 3 in the Third Schedule to the Assurance Companies Act, 1909. Note 3 merely provides that the balance-sheet must state how the values of the Stock Exchange securities are arrived at; and that if the value is more or less than the face value there must be something to show that the total is right. The note simply says that there must be an honest balance-sheet, and I cannot find in it the faintest suggestion of an intention to impose a statutory obligation upon a company of the class before us to replace capital lost by depreciation in the market value of securities before making a distribution of profits. Apart from the note I think the law must be taken as now settled that there is no such obligation. The authorities on the subject were fully considered by Peterson J. and by the Court of Appeal in *Ammonia Soda Co. v. Chamberlain* (1). This case, for the present, at all events, shows that the observations of the Lords in *Dovey v. Cory* (2) must not be taken as having overruled or qualified the previous decisions of the Court of Appeal. I refer to p. 292 of the judgment of Warrington L.J. as stating the law so far as it is applicable to the present case.

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MOLONY L.J.:—

I concur. The first point made by the appellants, namely, that the principal business of this insurance company consists in making investments, is wholly unsustainable.

As regards the other question raised I am satisfied that there is no statutory obligation on a limited company to replace capital lost by depreciation in securities. Does note 3 in the Third Schedule to the Assurance Companies Act, 1909, make any difference in the case of companies to which it applies? It seems to me that note 3 does not create in the case of insurance companies any statutory obligation which would place them in a position different from that of other companies. All the note requires is that the balance-sheet shall state the value of the Stock Exchange securities, and how the value of such securities has

(1) [1918] 1 Ch. 266.

(2) [1901] A. C. 477.

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been arrived at; and if they are taken at cost price the balance-sheet must show how the deficiency (if any) between that price and the existing market value is made up. In other words, the note prescribes that the balance-sheet shall contain a true statement of the affairs of the company, and it has no other effect.

Molony L.J.

Solicitors for the appellants: *A. O'Hagan & Son.*

Solicitor for the respondents: *Richard Martin.*

C. L.

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Principal and surety—Conditional undertaking in writing to pay debt of another—Promissory note—Guarantee—Indemnity stamp—Release of surety by giving of time to principal—Consent to giving of time—Evidence—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 33—R. S. C. Or. XL, r. 9.

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The defendant, amongst other signatories, signed an instrument whereby, in consideration of the plaintiffs advancing to P. and R. the sum of £140, he, jointly and severally with the other signatories, undertook to pay the plaintiffs the said sum, with the usual rate of bank interest, within six months from the date of the instrument. The plaintiffs subsequently advanced to P. and R. the sum agreed upon, taking from them promissory notes for the payment thereof, which notes were renewed from time to time without the express consent of the defendant. In an action by the plaintiffs against the defendant to recover the sum so advanced to P. and R. with interest:—

Held, by the King's Bench Division (Gibson and Kenny JJ.), (1) that the instrument was in its essence contingent and conditional, and was not a promissory note within the provisions of sect. 33 of the Stamp Act, 1891 (54 & 55 Vict. c. 39); (2) that the instrument was a guarantee for future advances, that the findings of the jury amounted to a verdict that the defendant consented to the giving of time to the principal debtors, that the defendant was therefore not thereby released, and that judgment should be entered for the plaintiffs.

Held, by the Court of Appeal (Sir I. J. O'Brien C., Ronan and Molony L.JJ.), affirming the judgment of the King's Bench Division on this point, that the instrument did not require to be stamped as a promissory note under sect. 33 of the Stamp Act, 1891. But *held* (Ronan L.J. dissentiente), reversing the King's Bench Division, that the instrument was a guarantee, that the plaintiffs had not discharged the onus of proving consent by the defendant to the giving of time to the principal debtors, and that the defendant was entitled to a direction at the trial.

MOTION FOR JUDGMENT.

The action was tried before the Lord Chief Justice and a special jury of the county of the city of Dublin, on the 2nd February, 1917. The plaintiffs claimed to recover £167 5s. 9d. as due to them under the following undertaking in writing, which was signed by the defendant and ten others:—

Stamp 6d.

24. 8. '16. To the Manager, Provincial Bank of Ireland, Ltd., Newry.

SIR,—In consideration of you advancing to Messrs. Porter and Rowland the sum of £140 we hereby jointly and severally undertake to pay you the said sum, with the usual rate of bank interest, within six months from this date.

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The plaintiffs pleaded that the said sum of £140 was advanced by the plaintiffs to Porter and Rowland, and that no part thereof, or any interest thereon, had been repaid to them.

The defendant by his defence, in addition to traversing the plaintiffs' claim, pleaded that he was released by the plaintiffs giving time to their principal debtors, Porter and Rowland, in pursuance of a binding agreement, and without the defendant's knowledge or consent.

The following summary of the evidence is taken from the learned judge's report of the trial:—

The manager of the plaintiffs' branch bank at Newry, Mr. Richardson, deposed that up to December, 1912, he knew nothing of Rowland and Porter. In that month Mr. Hunter Moore, a well-known solicitor in Newry, brought the document sued upon to Richardson's office. The defendant's signature and one other were then upon it. Witness then agreed, on the strength of the document, to advance £140, which he understood was required to provide the necessary security for costs in two actions which Rowland and Porter were bringing for alleged libel. Mr. Hunter Moore then took the document away with him for the purpose, as he stated, of getting additional signatures to it, and witness did not see it again until the month of September, 1916. It then had upon it nine additional signatures, but it was not stamped. Mr. Cowan, the solicitor acting on behalf of Rowland and Porter, came to witness's office, with Rowland and Porter, upon a subsequent day in December, 1912, and witness then paid each of the latter £70. Rowland and Porter then signed bills for £141 5s. Witness advanced the £140 on the strength of the document signed by the defendant. Cross-examined, Mr. Richardson stated that the bill was renewed seven or eight times, the first three renewals being for two months, and the last four for four months. Witness sent notice on the occasion of each renewal to the defendant's office by Rowland and Porter. Mr. Hunter Moore got the document stamped. On the 8th January, 1915, witness wrote to Mr. Hunter Moore the following letter:—

DEAR SIR,

Bills of R. Rowland and Jos. H. Porter for £158 5s. 4d. lying here unpaid since 27th ult. The money was advanced on 5th Dec., 1912, to above parties on the joint guarantee of yourself and others, and, owing to the want of punctuality in renewing them as they fall due, I shall be glad, if the loan

is to continue, some arrangement might be made that would avoid the bills going on every occasion overdue. We send a notice a week before maturity to the first name on the bill.

Yours faithfully,

(Signed) T. H. RICHARDSON,

Manager.

HUNTER MOORE, Esq.

Mr. Hunter Moore deposed that he got the document from the defendant, and brought it to the bank in December, 1912. The defendant's signature was then upon it. The witness signed it himself in the bank, and then brought it back to the defendant. He never saw it again until July, 1916. Witness knew the bills were being renewed. On receipt of the letter of the 8th January, 1916, witness showed it to the defendant. Witness could not say what knowledge the defendant had of the renewals; but he frequently discussed the subject with him, and the defendant never suggested that he was not aware of them, nor did he ever deny his liability on the undertaking. The plaintiffs' case having closed, Henry K.C., on behalf of the defendant, asked for a direction, 1, because the document sued upon was in law a promissory note, and not now capable of being stamped; 2, because the plaintiffs by taking the renewals and not reserving their rights against the sureties had released the sureties.

The learned judge reported that he then asked did either side suggest any question of fact for the jury, whereupon Mr. Henry asked that the opinion of the jury should be taken on the question whether the defendant had knowledge of the renewals. The judge said he would ask the jury whether the defendant had notice of them, and to this Mr. Henry agreed.

The defendant, a solicitor practising in Newry, deposed that he was not identified in any way with the actions of Rowland and Porter at the commencement, but later was asked by the local Unionist Association to assist in procuring the amount of £140 to provide the required security for costs. Mr. Cowan was solicitor for Rowland and Porter. Witness was solicitor for Mr. M'Cullagh, who had brought a similar action for libel, and witness provided the £70 security for costs required in his case. He never knew of the renewal of the bills until June, 1914, and was never consulted about them. He knew that bills had been

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K. B. Div. given originally. He told Porter towards the end of 1914 not
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Cross-examined, witness deposed that the three actions were amalgamated about the 7th March, 1913. Mr. Cowan died on the 27th May, 1914. Witness provided all the money for the litigation. The cases were subsequently settled, and portion of the money lodged as security by Rowland and Porter was paid out to them, and by them paid to witness. He only got his outlay out of the money. When Mr. Moore showed him the letter of the 8th January, 1915, he said, "This is a bad business." He told Porter not to renew, because he was annoyed that the cases should have been brought to Mr. Cowan and not to his firm. He knew there was a bill or promissory note signed at the start. If the question had been at any time directly brought to his mind, he would have known that the bank was not paid; but he did not trouble himself on this point, because he had assurances from the very highest political quarters that the claim of the bank would be paid.

Henry K.C. having renewed his requisition for a direction, the Lord Chief Justice left to the jury the question—Whether the defendant had notice of the renewals? The jury found that the defendant knew the bills were due, but that he got no notice prior to the 8th January, 1915, of the renewals.

The learned judge refused to enter judgment, and left the parties to move.

D. M. Wilson K.C. and *Phelps*, for the plaintiffs.

Henry K.C. and *Williamson K.C.* (*Lowry* with them), for the defendant.

The arguments were similar to those in the Court of Appeal.

Cur. adv. vult.

GIBSON J.:—

This case has been brought before us on cross-motions for judgment, neither party asking for a new trial. The evidence is loose and conflicting, with many conspicuous omissions of material points, and the only issue put and found by the jury thereon possibly might have been, but was not, challenged as inaccurate and ambiguous.

The argument at the bar was directed to the following points:—

1. Was the instrument a promissory note requiring to be stamped as such?

2. If it was such note, could it, not having been stamped as such, be sued on as any proof of a contract, subject to a *6d.* stamp?

3. If the undertaking was a contract, was it a guarantee creating the relation of principal and surety between Porter and Rowland, and the signatories on the one hand and the Bank on the other?

4. If it was such guarantee, were the notes and renewals taken by the bank with the knowledge and consent of the defendant?

This was the point mainly relied on by Mr. Henry. It would tell strongly against the document being at the same time a promissory note, while the plaintiffs' contention that the document created primary and exclusive liability might favour the view that it was a promissory note.

A further question might be suggested, if supported by evidence—whether the signatories were, as between themselves and the plaintiffs in the actions (which might have resulted in failure) entitled to be indemnified by the plaintiffs. Whatever may have been the relation of the parties to the bank, if 'as between themselves the gentlemen undertaking liability for the sums necessary to maintain the actions in the superior Courts had no right of recourse or indemnity against the plaintiffs, the doctrine of release from time given to the principal might have no application.

Many matters of importance are left uncertain or unproved: 1, the writs and libels in the three actions of Porter and Rowland (represented by Mr. Cowan, solicitor), and M'Cullagh (represented by Mr. Fisher, the defendant), all of a character apparently enlisting political sympathy and support; 2, the orders remitting the actions as not proper to be retained in the superior Court by persons without visible means, in the absence of security for costs; 3, the arrangement (if any) between the plaintiffs and

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other parties as to providing such security, or between the respective signatories, inter se, seven of whom executed the document after the advance was complete, at times and in circumstances not stated; 4, what became of the undertaking brought by Hunter Moore to defendant in December, 1912, till July, 1916, after which it was stamped by Hunter Moore; 5, the consolidation order of March, 1913, as to the three actions (including M'Cullagh's, in which defendant as solicitor advanced the £70 himself), after which Mr. Fisher apparently had the conduct of the amalgamated litigation, as he provided all the necessary outlay; 6, the terms of compromise and the order under which, with Mr. Fisher as solicitor, this money lodged as security was paid out; 7, how much of the money lodged was received by Mr. Fisher.

I shall first give a brief summary of the evidence, from which its unsatisfactory nature will be apparent.

Porter and Rowland (also apparently M'Cullagh) brought libel actions in which political interests were supposed to be involved. Remitting orders must have been made on the ground that the actions were such that they should not be kept in the High Court without security for costs, the respective plaintiffs being without visible means. Three gentlemen, Wallis and the two Fishers, proprio motu, or on a treaty which is not disclosed, signed a proposal undertaking to the Bank to procure the sum of £140, the security being £70 in each action. The paper, then a proposal to the bank; was given by defendant to Mr. Hunter Moore, who brought it to the bank and added his own name. The manager, Mr. Richardson, agreed to make the advance and handed back the document to Mr. Moore to enable him to get additional signatories. All the surrounding circumstances demonstrate that the document, brought to and given back by the manager, was not looked on as a promissory note. He did not see it afterwards till September, 1916, when it had seven additional names, when and by whom obtained does not appear. On December 5th, 1912, Porter and Rowland came to the bank with their solicitor, Mr. Cowan, and each got £70. For the aggregate sum of £140 they gave two two-months' notes. Neither those nor any of the renewals were proved; but it was stated

without objection that the first joint notes, for £100 and £41 5s. 6d., were renewed on February 5th, 1913, for two months; on 8th April, for two months; on 21st June, 1913, for four months; 21st November, 1913, for four months; April 4th, 1914, for four months; and 24th August, 1914, for four months, the last renewals.

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Why the respective plaintiffs, each getting £70 only, accepted joint liability for the entire advance is not explained. It would look as if they at least thought the guarantors would alone pay, and that they should not be called on to indemnify them.

Though Mr. Richardson was willing to make the advance on December 3rd, 1912, on the security offered, there was no binding contract till December 5th, 1912, when the money was advanced to Porter and Rowland. The conduct of the manager in giving up the document shows that he trusted the gentlemen as men of honour. There would be no actionable liability as against those who executed after the loan was made and the consideration executed, though possibly on the terms agreed on between themselves with one another they might be bound to contribute if the actual guarantors who were legally bound to the bank were compelled to pay.

On the occasion of each renewal the manager, treating the defendant as surety, sent (he alleges) notice to defendant by Rowland and Porter (the former of whom had a son in defendant's office). Neither was examined, and the receipt of such notice, whether oral or written, was not proved.

On January 8th, 1915, the manager wrote to Mr. Hunter Moore complaining of want of punctuality in renewing. Mr. Moore had been *dux facti* in the negotiations with the bank; he had got the undertaking from the defendant originally for that purpose, and given it back to him. He was well aware of the renewals and time given, and if sued he would have no defence. On his evidence a jury might well find that the defendant had similar knowledge. On receiving the letter Hunter Moore showed it to the defendant. What then took place or what defendant said, obviously material, is not disclosed. The defendant alleges he remarked, "This is a bad business"—an observation pointing, not to his objection to the renewals or being unaware of them, but

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Plaintiffs' case having closed, Mr. Henry asked for a direction on the grounds that the undertaking was a promissory note, which, being unstamped, could not be sued on; and that, if not a note, it was a guarantee, the sureties in which were released by giving time. The judge inquired whether there was any question of fact for the jury, and Mr. Henry asked for the opinion of the jury whether defendant had knowledge of the renewals at the time they were taken. The Chief Justice said he would ask the jury whether the defendant had notice of them. Mr. Henry agreed to this. Plaintiffs' counsel took no part in the discussion, apparently relying on the contract (which was not, as they argued, a guarantee) entitling them to a direction. At the time this question for the jury was formulated no evidence for the defendant had been given, and the question suggested could not dispose of the issue unless it meant that consent should be implied from knowledge.

The defendant's evidence on the subject is shortly as follows :— His client, Mr. M'Cullagh, had an independent action for the same libel, and Fisher himself had provided £70, the necessary security. He was not asked why he had adopted such an unusual course, and whether M'Cullagh (whose position in life is not stated), if defeated in the action, was to repay him the £70. All three actions were consolidated on the 7th of March, 1913, by an order not proved, and after that date defendant acted for the plaintiffs in the consolidated actions. He said he never knew about the renewals until the end of 1914 (the word "never" is omitted, as the Chief Justice informs us, from his report), and was never consulted about them. He admits he knew about the original notes. He alleges he told Porter (not Rowland, the father of his clerk) towards the end of 1914 not to renew. Who informed the defendant of the renewals and when is not stated. When shown the bank's letter of January 8th, 1915, he said, "This is a bad business." His reason for telling Porter not to renew was, he says, because he was annoyed that the case had been brought to Mr. Cowan. He knew this when he signed the guarantee on

December 3rd, 1912. Cowan died on 27th May, 1914, and from the date of the consolidation order of the 7th March, 1913, Fisher had been acting as solicitor. I do not understand the explanation. He suggests he did not know that the bank was not paid, as he relied on political assurances that it would be paid—ignorance surprising in one who had got Hunter Moore to manage the negotiation as his agent, who had conversations with him after, and who had control of the litigation since March, 1913. The actions were compromised on terms not mentioned; the amounts lodged were paid out under Court orders not proved (the date of which would be important), and the defendant got for his costs part of the money provided, as we know, by the bank. The amount is not stated. It was not argued whether by such receipt he may not have lost, at least pro tanto, the character of surety, if he was surety, on the principle that the money can be followed as in *Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society* (1) and many authorities since. I only notice the point as one requiring consideration. Why did Fisher get the money paid out to the impecunious plaintiffs without providing for the debt guaranteed to the bank? Did he adopt the same course with his client M'Cullagh, and let him receive the £70 provided by himself? By having the surety money paid to the plaintiffs, he took away the only fund to which the guarantors and the bank could look. If the guarantee was discharged by renewals, the bank would have been left no effective remedy.

I now turn to the questions to be decided. The definition in the Stamp Act is wide enough to cover the undertaking; but, without attempting any exact limitation of the definition, I do not think it extends to a promise to pay on an executory consideration, whether for sale of land or goods, loan of money, or guarantee, particularly where (as here) the instrument was, when signed, a mere proposal, only turned into a binding promise when the consideration was executed. If the contract was a guarantee for a future advance, which the bank was free to make or refuse, it is not at the same time a promissory note. It is not liable to two different stamps. No case has been cited giving such an extended

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K. B. Div. operation to the definition. The reasoning in *Smith v. Dean* (1)
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PROV. BANK and *Dickinson v. Bower* (2) is opposed to any such large interpreta-
v. tion. In *Smith v. Dean* (1) the promise to pay "on the day of
FISHER. the transfer of the licence" was construed as only fixing the date,
Gibson J. and not as making the execution of the transfer a term of the
 promise. The intention inferred from the circumstances of the
 transaction is material: *Sibree v. Tripp* (3); *The Mortgage Insurance*
Corporation Case (4). If the paper was a promissory note, it must
 have borne an impressed stamp before it was presented to the
 manager for his consideration. The paper was not intended to be,
 was not treated as, and was not in any mercantile sense, a
 promissory note. Mr. Wilson relied on the word "within" as
 inconsistent with the possibility of the undertaking being a
 promissory note, as it gave an option of paying before six months
 and therefore (he urged) made the time of payment uncertain. As
 to the nature of the promise, the word may be material. I have
 not found any example of a paper held to be valid as a note with
 such a term, but it is unnecessary for me to decide the point.

If the undertaking was a note, it could not, being unstamped,
 be used *proprio vigore* to prove a contract to pay, though in
 certain circumstances an unstamped note may be admissible to
 establish collateral matters of fact. The definitions in the Stamp
 Act may overlap. Where they do, the instrument should be
 stamped at the higher rate. That the self-same paper should be
 relied on as a simple contract at a low stamp or as a negotiable
 instrument at a high stamp at the option of the promisee is
 contrary to principle and common sense: *Brown, Shipley, & Co.'s*
Case (5).

Regarded as a contract, the undertaking was on its face a
 guarantee to the bank, and was acted on as such, the bank taking
 notes from the borrowers and describing the undertaking as a
 guarantee. There was only one debt; the borrowers who got the
 money were Porter and Rowland. *Prima facie*, in the absence of
 terms to the contrary, they would be bound to indemnify the
 defendant and his associates. It is said that the liability of Porter

(1) 6 L. J. K. B. 331.

(2) 14 T. L. R. 146.

(3) 15 M. & W., at p. 29.

(4) 21 Q. B. D., at p. 365.

(5) [1895] 2 Q. B. 598.

and Rowland was never contemplated by the bank, and that credit was exclusively given to the signatories. No doubt the borrowers were of doubtful solvency, but still they were treated by the bank as the borrowers and the primary debtors: *Harburg India Rubber Comb Co. v. Martin* (1). *Guild & Co. v. Conrad* (2) relied on by the plaintiffs bears no resemblance to the present facts. The rights of a surety where the case is not one of guarantee proper are settled by many authorities: *Duncan Fox & Co.'s Case* (3); *Rouse v. Bradford Banking Co.* (4). The credit of six months that the defendant was entitled to take before the undertaking could be enforced against him does not alter the nature of the liability. It was a special term not inconsistent with suretyship. A creditor may sue a principal or surety at his option; no demand on or refusal by the principal debtor is an essential preliminary. When the debt is payable, the duty to meet it at once attaches.

The remaining point, that principally pressed, as to giving time, is what has caused me most difficulty from the unsatisfactory character of the contradictory evidence with its omissions and the possible uncertainty of what the issue found may import.

If the defendant was surety with right of indemnity against Porter and Rowland, the giving of time proved would release him unless he knew and assented to it. This was a necessary issue if there was evidence to support it. I shall assume that Porter and Rowland were regarded by the bank as principal debtors who might be under an obligation to indemnify, though I question if anything of the kind was really contemplated by the signatories. If there was no such obligation as between them and the supposed sureties, I doubt if allowing extended credit to Porter and Rowland could give a defence to defendant, as he would, in that view, as between him and them, not really be a surety at all.

The reason that a surety is discharged by a contract between the creditor and principal debtor without his assent for extension of credit to the debtor, is that otherwise the contract between the creditor and debtor would be defeated, the surety being always entitled to resort to his principal for indemnity, whether before

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(1) [1902] 1 K. B. 778.

(2) [1894] 2 K. B. 885.

(3) 6 App. C. 1.

(4) [1894] A. C. 586.

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payment or after payment: *Wolmershausen v. Gullick* (1). The principle is explained by Lord Hatherley in the *Overend and Gurney Case* (2). It is proved to be the real explanation by the creditor's being able, without the surety's knowledge or assent, to give time to the principal if when he does so he reserves his right to resort to the surety. Hence time given to the surety under contract with him does not discharge the parties to the advance.

I think there was evidence at the close of the case justifying the conclusion that there was knowledge and consent. Unfortunately the issue (which lay on the plaintiffs) was not put in this, the invariable, form. The plaintiffs were not entitled to a direction on the view that defendant was not a surety, nor was the defendant entitled to a direction, as the point of consent was open and undetermined. The alleged consent was addressed not to any particular note, but to the course or system of renewals. Mr. Henry before us argued (what his question at the trial did not suggest) that the defendant was discharged by the original notes of December, 1912, as under the guarantee he was entitled to pay at once and need not have used the six months' credit. This would make the guarantee inoperative ab initio. The defendant, however, knew of and assented to the primary notes, and the issue put was confined to renewals.

The points which have caused me difficulty are:—1, the meaning of the question; 2, the meaning of the jury's answer; 3, the applicability of Order XL, rule 9, as to drawing inferences. It is most unfortunate that the trial was by a jury, as the controversy was one proper for a judge to determine. In interpreting the issue put and found, it is desirable to recollect the position of the parties and what the defendant himself admitted.

The delay was substantially in his interest, and I question if he and his co-guarantors to the bank ever seriously intended that the impecunious plaintiffs in the action could or would pay a sum which the signatories for some indirect motive saw fit to get in order to maintain the actions in the High Court. The persons mainly interested in keeping the actions in the High Court were the two solicitors, Cowan and Fisher. In construing the issue,

(1) [1893] 2 Ch. 514.

(2) L. R. 7 Ch., at p. 150.

the defendant's admissions are material: 1, he acknowledges knowing about the original notes of 5th December, 1912; 2, he was aware before the letter of 8th January, 1915, that there had been renewals, and cautioned Porter against further renewing; 3, the only notice from the bank proved to have reached him was the letter of January 8th, 1915; there was no evidence that any previous notice had been received. The question put and the answer of the jury must relate to matters not admitted but in dispute—knowledge of and consent to the renewals.

The question, which may have been oral, for it is not recorded in the registrar's certificate, was "Had the defendant notice of the renewals?" In no guarantee case that I am aware of has the word "notice" instead of "knowledge" been used. It must include knowledge. Does the question assume that, taking all the circumstances of the case into consideration, knowledge, if brought home to the defendant, must be taken as implying assent? If it does not bear that implication, it would deal with a subordinate factor and leave the fundamental issue of assent to the renewals undetermined. In many cases we find the formula "without knowledge or consent," and perhaps the absence of the word "consent" or "assent" may be thus accounted for. Knowledge without objection in certain conditions may involve assent. Silence may give consent, but mere knowledge with non-assent or dissent on the surety's part would not enable the creditor giving time to resist the surety's right to discharge. I must read the question as intended and accepted as sufficient to determine the issue raised on the pleading and evidence: Did defendant know of the course of renewals and acquiesce in it? It was certainly in a common-sense point of view for his benefit. Mr. Henry may have thought a question confined in terms to knowledge (which defendant had explicitly denied) was more favourable to him than a general question as to assent. However this may be, the issue adopted must be taken as one proper to determine the rights of the parties, if the contract was one of guarantee and there was evidence to support it.

The jury were obviously puzzled by the word "notice." The answer recorded in the registrar's certificate is two-fold: (a) that the defendant knew "the bills" were due, but that (b) he did not

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The answer is ambiguously expressed. The question was as to renewals. There was no dispute that defendant knew of the original notes of December, 1912. The point was as to subsequent renewals. "Bills" in the answer must mean renewals. It cannot mean that defendant never knew of renewals till the bank's letter, for he admitted he had such knowledge at the end of 1914. It was true that the defendant had no formal notice until the letter. There was no evidence to the contrary. The jury may have considered, on account of the term "notice" in the question, that they should make their view clear, if the absence of formal notice would benefit the defendant. The finding, which should have been Yes or No, was not challenged as uncertain or ambiguous, and was accepted as sufficient. Looking at the language used in the light of what was in dispute and what was removed from controversy by admission, I think that the jury meant to find that the defendant knew of the renewals, but had no official notice of them till January 8, 1915. The Chief Justice could not have intended to refer to us the meaning of the question and answer which he and the parties treated as free from ambiguity.

On the course of the trial, reading the question as pregnant with the assumption that knowledge, if found, would be equivalent to assent, and interpreting the language of the jury in the sense above explained, I think the plaintiffs are entitled to judgment.

Assuming, however, that, as Mr. Henry contends, the question inquired merely as to knowledge without any tacit implication of assent, a negative answer would have entitled the defendant to judgment, but an affirmative answer would leave the plaintiffs without any right to judgment unless an inference of assent could be drawn under Order XL, rule 9. I cannot believe that the Chief Justice put an imperfect question (which would involve a further trial) without its being accepted that the Court was to have a free hand in dealing with inferences of fact. We draw the inference of consent. The finding was taken by the judge as sufficiently deciding the only disputed matter for the jury's determination.

I have already referred to the unsatisfactory character of the evidence. There is no proof what arrangement (if any) was

made between Porter and Rowland and the defendant before December 3rd, 1912, or even that the former were aware of the guarantee proposed and given, or that they accepted liability to indemnify the defendant. The advance was made on December 5, 1912, without any of the guarantors being present. It is probable that they knew of the guarantee as Mr. Cowan did. Whether he communicated what he knew to them, or what authority he had from them as to the terms of the guarantee, we do not know. They were merely stalking-horses apparently in a litigation supported and maintained by others for political reasons. At the close of the case neither party was entitled to a direction, neither the plaintiffs, who contended that the renewals could not affect their cause of action grounded on supposed primary liability, nor the defendant, who relied on the renewals being without his knowledge and assent as surety. I have had much doubt whether in this perplexing state of affairs, with such loose evidence—accentuated by the unusual language of the finding—the Court should not order a new trial; but this was not asked for by either side, in the notice of motion or at the bar.

If my opinion that the plaintiffs are entitled to judgment was incorrect, a new trial would be inevitable, as the finding cannot reasonably be read as negating knowledge and assent so that the vital issue on the pleading and evidence would be undisposed of.

KENNY J. :—

It is not easy to arrive at definite and altogether satisfactory conclusions in this case, but I think the opinions expressed in the judgment of my brother Gibson represent the justice of it, having regard especially to the course of the trial. Two points of substance were submitted by the defendant—the first, that the document of the 3rd of December, 1912, was a promissory note within the meaning of the 33rd section of the Stamp Act, 1891—that it should have been stamped as a promissory note before signature, and, not having been so stamped, that the bank was debarred from recovering on it. The defendant's second point was that if the document should be held not to be a promissory note, it must be regarded as in the

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K. B. Duv. nature of a guarantee for the repayment of the loan by the bank
1917. to Messrs. Porter and Rowland, and that time was given by the
PROV. BANK bank to the latter which had the effect of discharging the defen-
v. dant. Time was undoubtedly given by the bank to the two
FISHER. persons who got the money, and it then became a question
Kenny J. whether it was given with the defendant's consent.

I confess to feeling some difficulty in dealing with the case in both aspects. If we held the document of the 3rd December, 1912, to be a promissory note, no other point could arise, as the plaintiffs' case would fail by reason of the inadmissibility in evidence of the document. On the mere form of the document it is a writing containing a promise to pay a sum of money, and therefore, *prima facie*, a promissory note within the words of the Stamp Act, requiring a proper "bill" stamp—but in its essence it was really contingent and conditional. The amount mentioned in it was not advanced at the time nor for some days afterwards, and it seems to me very clear that it was certainly never regarded either by the bank manager or by the defendant as in the nature of a negotiable instrument. The circumstances in which it was signed all negative the idea of its being a negotiable instrument. That it was at least a guarantee is, I think, obvious; but all the characteristics of a negotiable security are absent. It is given to the manager of the plaintiffs' bank, who is supposed to know his business as a banker, and who, if it was intended to be a negotiable security, would scarcely have dealt with it in the loose way in which he did. It was brought to him with the defendant's signature attached; and the gentleman who brought it affixed his own signature to it in the bank, and took it away in order to obtain other signatures, and the bank manager did not see it again for several years. In the meantime he advanced the £140 to the two persons named in the document and took bills from them for the amount, and these bills were negotiated and renewed from time to time up to 1914. I cannot think that the document was more than an agreement or guarantee. Although the bank advanced the £140 on the faith of it, the bank did not at the time get actual delivery of the document, and it apparently never occurred to the bank that it was a document requiring a bill stamp. The bank did not negotiate it, nor did they, as it seems

to me, do any act amounting to an adoption of it as a promissory note. It was treated as a guarantee and nothing else; and in considering the nature of the transaction we cannot leave out of consideration that the party taking the security was a gentleman presumably versed in banking and mercantile transactions, who knew the difference between a letter of guarantee and a promissory note. The document was not, in the words of the Master of the Rolls in *Yeo v. Daw* (1), given or taken as a promissory note but as an acknowledgment of liability for the contingent debt of another combined with an express promise to pay. If the document can on one view be regarded as a promissory note and in another as guarantee, and the solution of the question be difficult, I do not think we ought to be too subtle in construing it in favour of the defendant's view, in a case where it seems to me the merits are with the bank.

As to the document being at the least a guarantee for a future advance there can, I think, be no doubt. If so, did the renewals to Porter and Rowland release the defendant? They of course amounted to the giving of time to the principal debtors, and the only question is whether time was given with the defendant's consent. The course of the trial has been peculiar having regard to the onus of proof. At the close of the defendant's case the parties had clearly before their minds the issues that were involved. Defendant's counsel asked for a direction on the stamp point, and on that as to giving time without a reservation of rights. Whereupon the Lord Chief Justice asked if either side suggested any question of fact for the jury. Plaintiff's counsel, on whom rested the burden of shewing consent by the defendant to the renewals, made no suggestion, while defendant's counsel asked that a question might be put as to defendant's knowledge of the renewals—a thing quite distinct from consent and apparently immaterial unless as an element on the issue of consent. The Lord Chief Justice said he would leave to the jury the question of notice to the defendant of the renewals, but neither side asked to have put the simple question of consent. The jury found that the defendant knew the bills were due, but that he did not get notice from the bank until the letter of the 8th January, 1915.

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(1) 53 L. T., at p. 126.

K. B. Div. 1917. "Consent" is not in terms found by that verdict, but the parties and the judge seem to me to have acquiesced in the notion that the question would try the issue of "consent." If it was not formulated with that object, what could its purpose have been? Unless it meant "consent" standing by itself it presented an absolutely immaterial subject of inquiry unless knowledge was negatived; and I cannot help arriving at the conclusion that all parties considered that a finding by the jury of knowledge of the renewals would be tantamount to a finding of "consent." The defendant suggested the question as one that would try the case. The plaintiff made no objection to it, and the judge adopted it though in a different form. The jury made the matter quite clear by their answer.

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I am of opinion that, having regard to the course of the trial, the plaintiff was entitled to a verdict, and I concur with Gibson J. in thinking that judgment should now be entered for the bank.

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The defendant appealed to the Court of Appeal (1).

Henry K.C. and *Williamson K.C.* (*Cusack* with them), for the appellant:—

1. If the appellant was a surety he was discharged by the giving of time to the principals without his consent and knowledge: *Liquidators of Overend, Gurney, & Co. v. Liquidators of Oriental Financial Corporation* (2); *Maingay v. Lewis* (3). In *Lakeman v. Mountstephen* (4) Lord Selborne said: "There can be no suretyship unless there be a principal debtor, who, of course, may be constituted in the course of the transaction by matters ex post facto, and need not to be so at the time, but until there is a principal debtor there can be no suretyship." Here Porter and Rowland became principal debtors to the bank. Taking an acceptance is a giving of time to a debtor: *Howell v. Jones* (5). The appellant was not, as contended in the Court below, primarily liable under the document. If this was not a mere guarantee, as

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

(2) L. R. 7 H. L. 348, at pp. 360, 361.

(4) L. R. 7 H. L. 17, at p. 24.

(5) 1 C. M. & R. 97.

(3) 1 R. 5 C. L. 229.

we contend, the defendant at least comes within the definition of a surety as laid down by Jessel M.R. in *Imperial Bank v. London and St. Katherine Docks Co.* (1). He became "liable to pay the debt of another" . . . "gratuitously as between himself and the persons originally or primarily liable." See also 1 Williams' Saunders, 233-4. It is for the plaintiffs to establish both knowledge of and assent to the giving of time to the principals on the part of the appellant, and they have wholly failed to do so.

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2. This document is a promissory note under sect. 33 of the Stamp Act, 1891, if not under sect. 83 of the Bills of Exchange Act, 1882,* and, as it was not duly stamped as such, it could not legally have been given in evidence: sect. 14, sub-s. 4; *Fengl v. Fengl* (2); *Shenton v. James* (3).

In *Speyer Brothers v. Inland Revenue Commissioners* (4) the instruments in question, which were treasury notes issued by a foreign Government, with a promise to pay principal and interest to bearer at fixed dates, were held to be both promissory notes and marketable securities within the Stamp Act, 1891; and but for the fact that they were liable to the higher duty as marketable securities they would have been chargeable as promissory notes. Here there was nothing else but a promise to pay, and the case is clearly distinguishable from *Mortgage Insurance Corporation*

* Sect. 33 of the Stamp Act, 1891 (54 & 55 Vict. c. 39):—

(1) For the purposes of this Act the expression "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money.

(2) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money.

Sect. 83 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61):—

(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinate future time, a sum certain in money to, or to the order of, a specified person, or to bearer.

(1) L. R. 5 Ch. D. 195, at p. 200.

(2) [1914] P. 274.

(3) 5 Q. B. 199.

(4) [1906] 1 K. B. 318; [1907]

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v. *Commissioners of Inland Revenue* (1), where the document in question was an agreement containing other terms than a mere promise to pay, and was, accordingly, held to be chargeable as an agreement: *Brown, Shipley, & Co. v. Commissioners of Inland Revenue* (2).

In *Vallance v. Forbes* (3) it was held that a promissory note stamped as an agreement, and not as a promissory note, could not be given in evidence, though it had been stamped through the erroneous assessment of the Commissioners: *Thomson v. Bell* (4).

D. M. Wilson K.C. and *Phelps*, for the respondents:—

This document was not a promissory note within the Act. When it was brought to the bank it was a mere offer. Whether it would ever become a valid instrument, involving any liability on the part of Fisher, depended entirely on the volition of the bank. No instrument has ever been held to be a promissory note which contained a condition dependent upon the volition of the promisee.

Ronan L.J.:—Was it not a conditional promise to pay money?

Wilson K.C.:—It may be so considered; but the words in sub-s. 2 of sect. 33, “upon any condition or contingency,” cannot be construed literally, so as to include every possible condition or contingency. *Thomson v. Bell* (4) is an authority showing that this was not a promissory note. In *Shenton v. James* (5) Lord Denman said, “All here is past: something has been done for which the damages are ascertained, and the note is given in consideration of foregoing an action.” Here everything was executory at the date of the signing of the document. It is not enough to say that the document contains a promise to pay. *Mortgage Insurance Corporation v. Commissioners of Inland Revenue* (1) shows that a document coming within the very words of the section may not require to be stamped as a promissory note, being more properly stamped as an agreement.

(1) 20 Q. B. D. 645; 21 Q. B. D. 352. (3) 6 Court Sess. Cas. 4th series, 1099.

(4) 22 Court Sess. Cas., 4th series, 16.

(2) [1895] 2 Q. B. 598.

(5) 5 Q. B. 199.

We rely on *Yeo v. Dave* (1), where it was held that the instrument in question should be stamped as an agreement; *Dickinson v. Bower* (2); *Jarvis v. Wilkins* (3); *Jones v. Cooper* (4); *Sutton & Co. v. Grey* (5); *Guild & Co. v. Conrad* (6); *Gordon v. Martin* (7).

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As to the question of the release of the appellant by the giving of time, we contend that he is bound by the course of the trial, which was fought throughout by him on the basis that he knew nothing of the renewals. The question was left to the jury as framed by appellant's counsel; and was obviously intended to decide the point at issue. In any case we ask the Court to draw its own inferences of fact in favour of the respondents.

Henry K.C. in reply.

[The following cases were also referred to:—*Harburg India Rubber Comb Co. v. Martin* (8); *FitzGerald v. Dressler* (9); *Huggard v. Representative Church Body* (10); *British Union and National Insurance Co. v. Rawson* (11); *Cripps v. Hartnoll* (12).]

Cur. adv. vult.

SIR IGNATIUS J. O'BRIEN C.:—

This case has been so ably argued that I am not ashamed to confess that my opinion has wavered during the course of the hearing, but in the result I have arrived at a clear conclusion with regard to the several questions which have arisen. The plaintiffs and the defendant alike seek to have judgment entered in the action, which is brought by the plaintiffs to recover the sum of £167 5s. 9d., claimed to be due on foot of a document dated the 3rd December, 1912, and signed by the defendant and others. [His Lordship read the document, and continued]:—

The defendant at the trial raised two questions: first, he objected to this document being given in evidence at all, on the ground that it comes within the artificial definition of a promissory

(1) 33 L. T. Rep. (N. S.) 125.

(2) 14 T. L. R. 146.

(3) 7 M. & W. 410.

(4) 1 Cowp. 227.

(5) [1894] 1 K. B. 285.

(6) [1894] 2 Q. B. 885.

(7) Fitzgibbon's Rep. 302.

(8) [1902] 1 K. B. 778.

(9) 7 C. B. N. S. 374.

(10) [1916] 1 I. R. 1.

(11) [1916] 2 Ch. 476.

(12) 4 B. & S. 414.

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Accordingly, the first question we have to determine is whether or not this document is a promissory note within what I have termed the artificial definition in sect. 33 of the Act of 1891. It is admitted that it would not amount to a promissory note at common law, or under the Bills of Exchange Act, nor indeed could it have been contended that it did. It is not an unconditional promise to pay a sum certain. It is an undertaking to pay if an advance is made, not otherwise. That is the interpretation of the words, "in consideration of your advancing . . ." If the introductory words had been omitted, and there had been merely a joint and several undertaking to pay, the document would be a promissory note, but these introductory words make a wide difference, not only in form but in substance. It is argued, however, by the defendant, that it must come within the definition of a promissory note in sect. 33 of the Act of 1891, and so requires stamping as such, as it literally fulfils the requirements of the section. Now the words of this section, as of the corresponding section in the Act of 1870, are extremely wide; so wide indeed that it is really impossible to apply them literally, and so include not only promissory notes as commercially understood and defined

by the Bills of Exchange Act, but also every conceivable form of document containing a promise to pay a sum of money.

The first clause in sect. 33, sub-s. 2, of the Stamp Act of 1891, made its appearance for the first time in the Act of 1870. It is not to be found in 55 Geo. 3, c. 184, sched., Part I, although words similar to those in the 2nd clause of sect. 33 are there contained. That schedule provided that among the instruments which should be deemed and taken to be promissory notes there should be included "all notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to £20." These words, very similar as they are to the words in sect. 49 of the Act of 1870, and in sect. 33 of the present Act, were of course clearly intended to bring within the artificial definition of promissory notes for the purposes of Stamp Duty a particular class of instruments which would otherwise be outside it, including promises to pay sums of money upon a condition or contingency. The words in sect. 33, sub-s. 1, of the present Act, "For the purposes of this Act the expression 'promissory note' includes any document or writing (except a bank note) containing a promise to pay any sum of money," if taken in their literal sense would leave nothing to which sub-s. 2 would exclusively apply. They are wide enough to cover every case, for all the documents mentioned in sub-s. 2 would be documents in writing containing a promise to pay a sum of money. It is clear, I think, that one cannot arrive at the true construction of sub-s. 2 without first seeing what is the true meaning of sub-s. 1, and reading the two together.

The difficulty of construing the words of the first sub-section literally also arose in several cases under the Act of 1870, and I wish particularly to refer to the case of *Mortgage Insurance Corporation v. Commissioners of Inland Revenue* (1), where the words of sect. 49 of the Stamp Act, 1870—the corresponding section—were under consideration. Pollock B. there said (p. 653): "It must be admitted, I think, that the words of sect. 49 are not

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satisfied by merely showing that the document in question contained a promise to pay any sum of money. If that were the right view of the construction, the section would include cases in which a man said : ' I will pay to you £5 at Christmas if you will deliver to me a ton of hay before Christmas,' or ' I will pay you £100 at the end of ten months if you deliver to me two tons of hay at the end of each month ' ; or where there was an agreement whereby a tenancy was created for a specified period with a power for the tenant to enlarge that period upon payment of a sum by way of premium or increased rent. All these cases would satisfy the words ' containing a promise to pay any sum of money.' Applying the tests I have mentioned, I am of opinion that the document in question is not a promissory note in the sense that the parties intended to treat it as a document merely providing for the payment of money, nor is it a promissory note in the common acceptance of that term among business men and others accustomed to deal with promissory notes. If it be said that this construction does not give effect to the words of the Act, the answer is, I think, that we are not called upon to say whether any duty is payable at all, but to say whether the document more properly comes within sect. 49, relating to promissory notes, or within that part of the schedule which relates to agreements."

That statement of Pollock B. has not, so far as I know, ever been adversely commented upon, and every case which has decided that a particular document is outside the provisions of the Stamp Acts is substantially in harmony with that view. The document in question in that case was certainly not one of the class which one would naturally and ordinarily term a promissory note, namely, one containing a promise to pay a certain sum of money and no more; but it contained on the face of it provisions which introduced what may be termed a bilateral element, which rendered it impossible to hold that the document was a promissory note. The decision of the Court was affirmed on appeal by Lord Esher M.R. and Lindley and Bowen L.JJ.(1). Lord Esher said (p. 355) :—" To constitute the document a promissory note within that sub-section, there must be a promise to pay a defined sum of money, and a defined sum of money only." Lord Lindley said

(1) 21 Q. B. D. 352.

(p. 356):—"I am of the same opinion. . . ." "It has been pointed out by everyone who has had to construe the section that those words cannot receive a literal meaning, for, if they did, all sorts of documents as to which it would be absurd to suppose that they would be treated for any purpose as promissory notes, such as bonds, mortgages, &c., which contain a promise to pay, would have to be stamped as promissory notes. To make the section intelligible some rational limitation must be placed upon the words, but the difficulty is to know what limitation. The section speaks of a document containing a promise to pay a sum of money. In my opinion that means a definite sum of money, not a fluctuating or unascertained sum; and I also think that "containing a promise to pay" must mean that that is the substance of the document, the whole contents; it cannot mean containing a promise to pay forming one of a number of stipulations. If the instrument is not merely a promise to pay but contains a promise to pay in connexion with a number of other stipulations, then I think it is not a promissory note within the meaning of the section."

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A note is to be found in Roscoe's Digest of the Law of Evidence at Nisi Prius (18th ed., p. 243), of a case of *Thompson v. Condry* (1), where the following document was in question:—"I hereby undertake to pay you on the first allotment of shares in the above-named company the sum of £105 out of commission I shall have to pay E.M. in accordance with his letter to you on the other side." This document was held not to require a note stamp under sect. 33. The note is—"Cor. Pollock B., after consulting with Kelly C.B. Ex. rel. editoris." This decision, though only reported in this way as a note, appears to confirm the view which I take of the document in the present case.

I wish now to refer to an early case of *Jarvis v. Wilkins* (2), decided in 1841, when the provision in force was the equivalent of sub-sect. 2 of sect. 33, viz., 55 Geo. 3, already quoted. The words of the document there in question were—"I undertake to pay to Mr. Robert Jarvis the sum of £6 4s. for a suit ordered by Daniel Page. S. W. Wilkins." The Court held that this document was not a promissory note requiring to be stamped as such.

(1) Unreported.

(2) 7 M. & W. 410.

Appeal. Parke B. said—"If the memorandum contained only a promise
 1918. to pay £6 4s. for goods already supplied, it would be a promissory
PROV. BANK note, and would require a stamp, but the introduction of the word
v. 'ordered' makes all the difference, as it shows that it is a promise
FISHER. to pay for goods if supplied, but which were not then delivered.
Sir Ignatius J. We are, therefore, enabled to collect from the instrument itself
O'Brien C. that the consideration for the promise was not an executed con-
 sideration, but the future delivery of goods already ordered. No
 objection has been made that the contract varies from that
 declared upon; and the only questions are—first, is this a
 promissory note? I think it is not, for the reasons I have already
 stated; and, secondly, if not a promissory note, is it a binding
 guarantee? The rule is now perfectly settled, that the considera-
 tion must appear upon the face of the instrument itself, either in
 express terms or by necessary implication. I think in this case the
 consideration may be collected by necessary inference, and
 therefore that the instrument is a binding guarantee."

This case seems to me to be an authority in the present case
 and to cover the question at issue. Without attempting a definition
 of what the section in reason includes, it is enough to say that I do
 not consider this document is within it.

It is not necessary to adopt the view expressed in the decision
 in *Thomson v. Bell* (1), that is to say, no document is included
 except one containing a unilateral contract which becomes effective
 on delivery; but I am far from saying it may not be right.
 Speaking generally, I should be disposed myself to think that it
 would be very difficult to discover any document which on the face
 of it is what has been called a bilateral agreement, and comes
 within the definition of a promissory note in either sub-section 1
 or sub-section 2.

I quite admit that a document may be a promissory note and
 also at the same time a different class of document, such as a
 debenture. That, however, does not disturb the view I take of the
 section, which is in accordance with the decisions under both the
 Act of George and that of 1870. In my judgment on this first
 branch of the case this is not a promissory note.

I now come to the question whether it is a guarantee or an indemnity. As to this, I agree with the judgment of the King's Bench Division that it is a guarantee and nothing else. The case of *Jarvis v. Wilkins* (1), to which I have already referred, is an authority upon this point also, as the Court in that case beyond all doubt regarded the document in question as a guarantee. It is said that it was not essential for the Court in that case to consider whether it was an indemnity or not, because as it contained a contract relating to the sale of goods it might not have required a stamp at all under the statute. It is, however, clear to my mind that the eminent members of the Court could not have overlooked this distinction.

I do not think it necessary to go through all the authorities cited on this branch of the case, as I consider the law is as stated in *Davys v. Buswell* (2).

[His Lordship read the judgment of Vaughan Williams L.J., from the words "as I understand it," p. 54, to the words "his express promise," p. 55, and the judgment of Kennedy L.J., from the words "whether Lord Esher," p. 57, to the words "property cases," p. 58.]

I am satisfied on the authorities that the document here in question was a guarantee and not an indemnity. *

I now come to the last question in this case, namely, whether the defendant was released from liability by reason of the action of the plaintiffs in giving time to Porter and Rowland. As to this, it is admitted that the taking of the renewals did amount to a giving of time; and it is also admitted that the onus is cast on the plaintiffs of proving that the defendant consented to the taking of these renewals. I now approach the evidence.

[His Lordship reviewed the evidence at length, and came to the conclusion that there was no evidence on which the jury could arrive at a finding that the defendant had consented to the renewals being given, and continued :]

The plaintiffs have wholly failed to discharge the onus of proof which lies on them, and in my opinion judgment ought to be entered for the defendant.

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(1) 7 M. & W. 410.

(2) [1913] 2 K. B. 47.

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In this case I regret that I differ from my colleagues, but I am unable to come to the conclusion that the judgments of Gibson and Kenny JJ. in the Court below should be reversed. The facts of the case are stated in these judgments, which I adopt, and the following observations must be taken as supplemental to them:— This at first sight seems an incredible case. Eleven solvent, respectable gentlemen desire a bank to advance £140 to two paupers for a certain purpose, and agree to secure the repayment of the money to the bank. One of them, the present defendant, a solicitor of standing, prepares the security, and sends it to the bank—the bank advance the money on the faith of it. The bank, not being paid by the paupers (as no one for a moment ever thought they would) seek to enforce the security, and sue the defendant as one of the guarantors. His course would appear plain, i.e. to pay the money, then to ask for, and, if necessary enforce, contribution by his co-sureties. This right, as is well known, depends on general principles of equity, and is enforced on these principles. The amount that each should contribute would be about £15. There is no doubt that the money was honestly due to the bank by the guarantors. But what does the defendant do? He does not bring in the co-sureties as third parties. He does not seek to have the contributions settled on equitable principles, but he meets the bank's claim by saying first—the document I prepared, and on the faith of which I induced you to lend the money, was waste paper. It should have been written on stamped paper; true, I represented to you that it was a valid document, and you acted on my representation, but I have since discovered that it is invalid owing to my error, and accordingly you must look to the paupers for your money.

It is really impossible to believe that a gentleman in the defendant's position would take up such an attitude. He says in the next place—it is unjust and inequitable that you should ask me to pay, because by your course of dealing with the paupers you deprived me during certain months of the valuable right of paying you the money and suing the paupers for it.

It is obviously absurd to suggest that the defendant would ever have thought of suing the paupers. These are the only defences relied on in this action. It is incredible that a gentleman in the defendant's position would rely on such technical defences in order to evade payment of an honest debt of £15. There must be some other explanation of the case, some reason why the defendant is unwilling to have the question of contribution between himself and his co-sureties settled according to the rules of equity. There can be no question as to his right to have this done if he is compelled to pay the entire debt. In order to understand and appreciate the evidence and the course of the case, it is desirable to know the real matters which have given rise to this action. There were three actions in respect of the same libels: M'Cullagh's, Porter's, and Rowland's. For simplicity I shall refer to the two latter as if they were one action, and call it Porter's. Orders were made remitting the actions in default of the plaintiffs' giving security for the defendants' costs. All parties knew and acted on the assumption that the plaintiffs had no means, and that no money could be got from them. Mr. Fisher was solicitor for M'Cullagh; a Mr. Cowan for Porter. When the orders were made, Mr. Fisher, out of his own money, lodged in Court £70 as security for the defendant's costs in M'Cullagh's action. £140 was lodged as similar security in Porter's action. This £140 was obtained from the bank by means of the document sued on. I shall assume for a moment that instead of going to the bank, the signatories to the document had, out of their own moneys, subscribed the £140 in equal shares. The lodgments were made by the solicitors in the two actions. What effect had the lodgment on the property in the money?

I take M'Cullagh's case first. Mr. Fisher did not make a gift of the £70 to M'Cullagh: it remained Mr. Fisher's property, subject to being wholly or in part captured for the purpose of paying the defendant's costs in the action. If M'Cullagh changed his solicitor the next day, as he could have done, that solicitor could not have applied any part of Mr. Fisher's £70 in payment of costs due to him by M'Cullagh.

As to Porter's case, the signatories did not make a gift of the £140 to Porter: it remained their property, subject to being

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captured, wholly or in part, for the purpose of paying the defendant's costs in the action. Cowan, if he had continued solicitor, would have had no right to apply one farthing of this money towards payment of costs due to him by Porter. When Porter changed his solicitor and appointed Fisher instead of Cowan, Fisher acquired no greater right to this £140 lodged in Court than Cowan had. If Cowan had been given carriage of the consolidated actions I think Mr. Fisher would have been considerably surprised if Cowan claimed a right to apply the £70 lodged by Fisher in payment of costs due to Cowan by M'Cullagh. He would have said, "I never lodged the £70 to secure the costs due to M'Cullagh's solicitor for the time being; it was only lodged to secure the defendant's costs: subject to that it was my money."

In my opinion the defendant had just as little right to apply the £140 supplied by the guarantors in payment of costs due to him by Porter as Cowan would have had to apply Fisher's £70 in the case I have stated. There never was any agreement by the guarantors to pay the costs of the plaintiff's solicitor in the action, or to allow the £140 to be applied for any purpose except as security for defendant's costs. The defendant says in his evidence: "I provided all the money for the litigation. The cases were subsequently settled. Portion of the money lodged by Rowland and Porter was paid out to them, and by them paid to me. I only got my outlay out of it." During the argument I said to Mr. Henry, "Is not the real question at the root of the present case that Mr. Fisher wants to make his co-signatories pay his entire profit costs due to him by Porter?" Mr. Henry said, "No; the portion of the £140 retained by him is only enough to cover his outlay."

In my opinion this claim of Fisher to retain any portion of the £140 in payment of any costs due to him by Porter is absolutely devoid of foundation. It is immaterial that the £140 was raised at the bank on the credit of the signatories instead of being paid in cash out of their pockets. It is equally immaterial that it passed through the hands of Porter, Rowland, Cowan, and through the Court before it reached the hands of Fisher. All were well aware that it was the money of the signatories, subject only to be made liable for the defendant's costs in the action.

This explains what was stated in the argument to be the reason why Fisher was sued by the bank. The other signatories said: "Fisher has the money in his pocket, sue him for it"; and the bank did so. I am reluctantly driven to the conclusion that the defendant has defended this action in order to retain this money to which he is not entitled, and to prevent the liabilities, inter se, of himself and his co-sureties being determined on equitable principles. It is in substance insisting on his co-signatories paying the whole or part of his costs in the action, which he knows they never agreed to do.

We must, however, determine the validity of the technical defences pleaded. They are both, in my opinion, wholly devoid of merits. The defendant would, however, probably say that he objected to being sued alone. I have already pointed out that he had his full right to enforce contribution.

As to the stamp question: the Stamp Act is a taxing Act, and it must be construed in favour of the subject. The provisions in relation to bills and notes are of the most stringent character. If a document such as the present were held to be a promissory note, "every person who issues, indorses, transfers, negotiates, presents for payment" such a document shall (under sect. 54, sub-s. 1, of the Act of 1870) "forfeit the sum of £10"; (under sect. 38, sub-s. 1, of the present Act) "shall incur a fine of £10"; and, under both Acts, "the person who takes or receives from any other person any such note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon or to make the same available for any purpose whatever." It is therefore a highly penal provision also. As to the final clause which I have quoted, in *Adams v. Morgan* (1) the Lord Chief Baron thought that this could be read: "make the same available" as a bill of exchange or promissory note "for any purpose whatever." The Court of Appeal (2) in the same case declined to take this limited view of the section, and held that the words of the Act must have their full general operation. It therefore would follow that where a person offers to make a payment of a fixed amount at a fixed time if another person does something, and the other person does it, be it to convey land, render services, or anything else, the offer

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(1) 12 L. R. Ir., at p. 12.

(2) 14 L. R. Ir., at p. 148.

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can never be given in evidence to prove the transaction, unless written on stamped paper, and the making of such an offer on ordinary paper is a crime punishable by law. I take three examples of what I mean—A, B, and C.

A.—“It is hereby agreed between the bank and the signatories as follows:—1. The bank shall on demand advance to Porter the sum of £140. 2. The signatories shall pay the said sum to the bank within six months from this date.” Can it be doubted that this document would be an agreement and not a promissory note?

B.—1. “If you will agree to advance £140 to Porter on demand, we promise to pay you the said sum in six months.” 2. “I accept the above proposal, and agree accordingly to make the said advance on the terms aforesaid.” Can it be doubted that this would be an agreement identical with A, and that a promissory note stamp would be insufficient?

C.—1. “If you will advance £140, we promise to pay you the said sum in six months.” 2. Money advanced; implied acceptance. Every contract involves a proposal and acceptance.

A is not in this form; B and C are. B is a case of express acceptance, C of implied acceptance. B is really the same thing as A. Could it be contended that in clause 1 of B the proposal required the impressed stamp of a promissory note, and that the entire then required the agreement stamp? The implied acceptance has the same effect as the express acceptance. It is the acceptance that turns the proposal into a contract and makes it require a stamp as such. Until acceptance, express or implied, the offer is not binding, and is revocable. [See 15 Halsbury, pp. 448–9, article 878, where the cases are collected.]

The mere use of the word “promise” in the offer does not alter its character as an offer. If the document in the present case had been in the form—“We hereby offer to guarantee you the repayment of £140 in six months if you advance that sum to Porter,” it would have had precisely the same legal effect.

In stamp cases the Court looks at the substance of the transaction. In *Wale v. Commissioners of Inland Revenue* (1) (a question whether an instrument should be stamped as a transfer of mortgage), Kelly C.B. says:—“The particular mode and form in

which the change or transfer was carried out do not affect the question. In substance the effect of the whole transaction was a transfer. . . . In substance, therefore, this is a transfer." Other authorities to the same effect are cited in 24 Halsbury, 713.

In substance and legal effect this document was only an offer. What is the legal effect of an offer? In the well-known *Carbotic Smoke Ball Case* (1) Hawkins J. says:—"The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of an agreement already made. A mere proposal or offer until accepted amounts to nothing." And he cites four cases in support of his statement.

No case was cited in which an offer capable of being turned into a contract by acceptance was held to require any stamp. If it were held that the document in this case should bear an impressed stamp, then every offer or order for goods, services, carriage, purchases of land, . . . in short, every written proposal to make a contract of any class which would involve payment of a definite sum by the proposer would require to be made on paper with an impressed stamp, and would be a criminal offence if made on ordinary paper. *Jarvis v. Wilkins* (2) is the only case I have found in which it was suggested that a document like the present was subject to the stamp duty on promissory notes.

The document was—"I undertake to pay to Mr. Robert Jarvis the sum of £6 4s. for a suit of, ordered by Daniel Page." Parke B. said—"If the memorandum contained only a promise to pay £6 4s. for goods already supplied, it would be a promissory note, and would require a stamp; but the introduction of the word 'ordered' makes all the difference, as it shows that it is a promise to pay for goods if supplied, but which were not then delivered. We are, therefore, enabled to collect from the instrument itself that the consideration for the promise was not an executed consideration, but the future delivery of goods already ordered." In other words, it was an offer to pay for the goods if the other party delivered them to Page. Consequently, it was held

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(1) [1892] 2 Q. B. 484, at p. 490.

(2) [1841] 7 M. & W. 410.

Appel. not to require the stamp as a promissory note, but that on the
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Mr. Henry suggested that the judges were not aware of the statute then in force as to stamps on promissory notes. This is a strong assumption, as the Act had been in force for a long time. It contained practically the same words as the Acts of 1870 and 1891. I am therefore of opinion that the first defence fails.

I now come to the second defence. The ordinary case of release of a surety by giving time to the principal debtor is plain enough. At the date of the guarantee there is a principal debtor, and his liability to pay the debt at a fixed time is ascertained. Here the document was signed on the 3rd December. There was then no debt and no principal debtor; the only time fixed was for the specified payment, that was within six months from the 3rd December, 1912. There was nothing as to when the £140 was to be advanced. So far as the document goes, it would cover any advance prior to the 3rd of June. Here we are driven to the surrounding circumstances to construe the document. They show that all parties intended the advance to be made so as to be available for the intended purpose of giving the security within the time limited by the order of the Court. The defendant thoroughly understood this, as he was himself advancing the corresponding £70 under the similar order in M'Cullagh's case. The bank was to make the advance so that the money could be lodged in time. But what stipulation was made as to the terms on which the advance was to be made to Porter and Rowland? What was to be their liability to repay it? at what time was repayment by them to be enforceable? Did any of the persons concerned ever contemplate the possibility of recovering the money from them if it was applied in payment of the defendants' costs in the actions? It is obvious that they did not. Porter and Rowland were simply regarded as persons represented by a respectable solicitor. The money was handed to them solely for the purpose of being lodged in Court, and they were to have no further interest in or liability in respect of it. Their personal liability to repay it was absolutely disregarded. No terms were made in relation to it. The bank was left a free hand in the matter. Everyone trusted that everyone else would do what was just and fair. No one

thought that if the money was paid out of Court to these poor men they would steal it or convert it to their own use. No precaution was taken to prevent what has happened. The money was advanced on the 5th December and duly lodged in Court. What was the real transaction? Surely these men were only given the money on the terms that it should be lodged in Court for the purposes of the order. No one thought that they could have any further interest in it. The bank was protected by the absolute promise of the signatories to repay the money on the 3rd of June. The advance turned the offer into a contract. So long as the money remained in Court no one contemplated the possibility of any proceedings against Porter and Rowland. If the money was set free, it was the plain understanding of all parties that it should be returned to the bank if the signatories had not paid the bank. If they had paid the bank, it should be returned to them either directly or through the bank. There was never any idea that Mr. Cowan should have a claim on it for his costs. The bank made the advance according to the usual practice. They took promissory notes for the amount from Porter and Rowland payable in two months. If they had taken notes payable two days after the money was paid out of Court to Porter and Rowland, would it have been beyond the scope of the guarantee? In my opinion it would have carried out the real understanding of the parties. The bank was not bound to take a note for any specified time. Mr. Henry, pressed by this view of the case, was driven to argue that the bank had no power under the document to take notes at all for the advance; that the advance contemplated by the document was an advance repayable forthwith, and that the taking of the original notes made the advance itself a giving of time. In my opinion, he was driven to this. But the result of this would be not a giving of time, it would have been that as the consideration was never performed, there was no acceptance of the offer; it remained an offer only, and there was no contract. But, as Gibson J. pointed out in the Court below, "the defendant knew of and assented to the promissory notes, and the issue was confined to renewals." This puts an end to the argument.

In my opinion on the true construction of the agreement the

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bank was authorized to make the advance on reasonable terms as to time of repayment. If the bank had taken a note payable at a reasonable estimate of the time when the money might be set free, I think it would have been within the scope of the agreement. If this was so it was more to the advantage of the sureties to take a series of short notes during the same time, as if the money got free by any chance they could then enforce the agreement.

Having regard to all these matters, I have considerable doubt whether the absolute promise of the signatories to pay at the fixed date irrespective of the time and terms of the advance does not make the document an indemnity, and also whether the renewals of the original short notes given after the date of the guarantee put the case in the same position as if the original short notes had been given prior to that date and constituted the guarantee a debt.

Assuming that the taking of the first notes put the case in the same position as if the guarantee had been one for the payment of an existing debt payable in two months, I take now the question of the renewals. This case was tried by a judge who was for many years the unquestioned leader of the Common Law Bar. The counsel, only to mention the leaders, our deeply regretted friend, the late Solicitor-General, and Mr. Henry, were men of great eminence and experience. All three were perfectly familiar with the law as to the discharge of a surety by giving time to a debtor. They all knew that a renewal is a giving of time, that in such a case the only question is whether it was done with the consent of the surety. [His Lordship referred to the pleadings and continued:] With such a judge and such counsel time is not wasted with immaterial matters and technical proof. All want the real questions in the case tried and finally disposed of, or, if this is impossible, put in a position to be finally disposed of by the Court above. On this part of the case all knew that renewals were an extension, and that the only question in such a case was the consent of the surety. When a case is tried in this way it causes difficulty in the Court above, because so much has been taken for granted and admitted at the trial that the notes seem very bald and imperfect. Mr. Justice Gibson has pointed this out in the present case.

Mr. Henry asked for a direction at the close of the plaintiff's

case *inter alia* on the ground of the extension of time. [His Lordship referred to the judge's note and continued:] He renewed the requisition at the close of the case. The judge charged the jury. I infer that he properly explained to them the law applicable to the discharge of a surety. There was no objection to his charge. [His Lordship referred to the question put to the jury and their answer thereto and continued:] I was disposed to take one view of this answer. The Lord Chancellor was disposed to take a different view. We all thought it well that he should see the Lord Chief Justice, who was good enough to give us a memorandum in which he states:—"I understood clearly that the jury intended to convey that while the defendant knew, in fact, of the bills and the renewals, he did not get notice of the latter from the bank. From the course of the trial it seemed to me that the answer of the jury so read was in full agreement with the evidence." This is in accordance with the view which I had taken previously; it is the view taken by the judges in the Court below. I infer, as they did, that the jury intended to find that the renewals went on with the knowledge and assent of the defendant, and that this was explained to them as the real question by the Lord Chief Justice.

I think there was ample evidence to sustain this finding. The defendant knew that the advance was made in the ordinary way by bankers on promissory notes; he knew that the loan was continuing, not repaid; he knew that this, in the ordinary course of business, was done by renewals. He had in his own custody the document securing the bank. I cannot believe that the Lord Chief Justice only left an immaterial question to the jury.

I have carefully read and considered the judgments of Gibson and Kenny JJ. in the Court below. They satisfy me that there was full power to give judgment for the plaintiffs under Order 40 (9), and I am not prepared to interfere with the exercise of their discretion in not directing a new trial. The defendant did not ask for a new trial in his notice of motion or in the Court below. Neither did he ask for it in this Court, though Gibson J. had stated in his judgment as follows. [His Lordship read from the judgment of Gibson J., and continued:] At the very close of the case I asked Mr. Henry if he desired a new trial. He very

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candidly replied that he would rather have a new trial than a judgment against him, but in neither Court is there any argument for a new trial.

In these circumstances, I am not prepared to interfere with the exercise of their discretion by the Court below in not directing a new trial. The only other course to take is that adopted by them, namely, to draw the necessary inferences of fact, and in my judgment their order ought to be affirmed.

MOLONY L.J. :—

I am satisfied that the document signed on the 3rd December, 1912, was a guarantee and not a promissory note, or an indemnity, and I have nothing to add to the judgments of the Lord Chancellor and of the judges of the King's Bench Division on this point.

The defendant's liability being that of a guarantor, he has pleaded that he has been released by the plaintiffs giving time to the principal debtors, Messrs. Porter and Rowland, in pursuance of a binding agreement, and without his knowledge or consent.

It is admitted that at the time of the original advance the plaintiffs took from Messrs. Porter and Rowland two promissory notes for £100 and £41 5s. 6d. respectively, payable two months after date, and that these notes were renewed on six subsequent occasions, the last renewal being on the 24th of August, 1914, for four months.

The question at issue in the action was: were these renewals given with the consent of the defendant, as it must be conceded on the authorities that if given without such consent, he was released.

Let us now see (a) on whom the onus of proof lies, and (b) the nature of the evidence necessary to support the plea.

It is, I think, clear that once it is proved that time has in fact been given, the onus of proving that it has been so given with the consent of the defendant lies on the plaintiff. Pigott C.B., in *Maingay v. Lewis* (1), correctly stated the law as regards the onus of proof in the following words:—

“The act of assent is that which would constitute an answer

(1) I. R. 5 C. L. 229, at p. 242.

to the defence founded on giving time to the principal; and prima facie, and until that act is shown to have been done, the allegations of the defence constitute an answer to the action. Otherwise I do not see well how the propositions laid down in Stephen on Pleading, 290, 292; in Comyn's Dig. Pleader (C 81); and in Archbold's Pleading, 96, 97; and the decisions to which they refer can be at all applied. It cannot be contended that every fact which would answer the allegations of a defence must be negatived as if the defence were a plea by way of estoppel. It may be observed that the matter of the omitted negative does not lie peculiarly within the knowledge of the defendant. There cannot be an assent given by one person to another without the knowledge of the person to whom it is given. The plaintiff could not have given time with the assent of the defendant without knowing that he did so."

The onus then being on the plaintiff, what is the nature of the evidence necessary to support it? Knowledge of time having been given is not, per se, enough. There must be either direct evidence of consent, or evidence from which a jury might reasonably infer it. The judgment of Blackburn J. in *Polak v. Everett* (1), which was affirmed by the Court of Appeal, and has been adopted in many subsequent cases, is instructive as to the nature of the evidence which must be given on behalf of a plaintiff to prove consent. He said:—"We must take it to be the fact that, though the defendant was well aware of this release being executed, he was not an assenting party to it. Then it is argued that knowledge on the part of the surety that there is going to be a release of a part of the security is enough without assent. I cannot see any authority for that. In *Pickford v. Sears* (2) it was held that he who stands by and sees another alter his position on the faith of a fact which he can contradict, cannot afterwards take advantage of that alteration. But the rule was corrected in *Freeman v. Cooke* (3), where it was said that if a man stands by and allows another to act without objecting, when, from the usage of trade or otherwise there is a duty to speak, his silence would preclude him as much as if he proposed the act himself. But to

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(1) 1 Q. B. D. 669, at p. 673.

(2) 6 Ad. & Ellis, 469-474.

(3) 2 Ex. 654.

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say that a person who, being a surety, becomes aware that the creditor is going to give time or do something else which, if done without his assent, may discharge him, he is bound to warn the creditor against doing it, is a thing for which no authority whatever has been cited."

Let us now see what was the nature of the evidence given on behalf of the plaintiffs in the present case. Two witnesses were examined on the part of the plaintiffs, namely, Mr. Richardson, the manager of the plaintiffs' branch at Newry, and Mr. Hunter Moore, the well-known solicitor, whom Gibson J. described as *dux facti* in the negotiations with the bank. Mr. Richardson described how Mr. Hunter Moore brought the undertaking into his office in December, 1912, and that at that time the signatures of the defendant and of two other persons were on it, and that upon the strength of the document he agreed to advance £140, which he understood was required to provide the necessary security in the two actions which Rowland and Porter were bringing for alleged libel. On the 5th December, 1912, Messrs. Rowland and Porter came to the bank, and he paid each of them £70, and they then signed the two bills for £100 and £41 5s. 6d. He did not state in his direct examination anything about the bills having been renewed, but in the course of his cross-examination he admitted that the bills were renewed some seven or eight times; and he then stated that he sent notice on the occasion of each renewal to the defendant's office by Rowland and Porter. Rowland and Porter were not examined.

Mr. Hunter Moore stated that he himself knew that the bills were being renewed, but that he did not intervene in any way in the matter until he received the letter from Mr. Richardson of the 8th January, 1915, in which he complained that the promissory notes of the 24th August, 1914, were lying there unpaid since the 27th November, 1914, and that if the loan was to be continued he would be glad if some arrangement could be come to so as to avoid the bills going on every occasion overdue. Mr. Hunter Moore says that he brought that letter and showed it to the defendant; that he could not exactly say what knowledge the defendant had of the renewals, but that he frequently discussed the subject with him, and he never suggested that he was not aware of them, nor did he ever deny his liability on the undertaking.

On the plaintiffs' case I do not see that there was any evidence on which a jury could act to show that the defendant either knew of or consented to the renewals; and I think that Mr. Henry was quite justified in asking for a direction on the ground that the plaintiffs by taking the renewals and not reserving their rights against the sureties had released the sureties.

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The Lord Chief Justice asked did either side suggest any question of fact for the jury, and it is very curious that the plaintiffs, on whom the onus of proof lay, did not ask that any question should be submitted to the jury. Mr. Henry, however, asked the Chief Justice to take the opinion of the jury on the question whether the defendant had knowledge of the renewals at the time they were taken. I am unable to see why Mr. Henry asked such a question to be submitted to the jury, as the onus was not on him; and if it were, the question which he asked to be submitted would not have determined it. The Lord Chief Justice said he would ask the jury whether the defendant had notice of the renewals, and to this Mr. Henry agreed. I am quite satisfied that such a question is immaterial; notice is not enough; knowledge is not enough; consent is essential.

The defendant was then examined, and he swore specifically that he never knew about the renewal of the bills going on until towards the end of 1914. He was never consulted about them. He knew that bills had originally been given, but he told Porter towards the end of 1914 that they were not to be renewed. He subsequently on cross-examination repeated that he knew there was a bill or promissory note signed at the start, and that if the question had been at any time brought to his mind he would have known that the bank was not paid, but that he did not trouble himself on this point, because he had assurances from the very highest political quarter that the claim of the bank would be paid.

The result is that the plaintiffs, in my opinion, have given no evidence that the defendant ever knew of or assented to the renewals, and the defendant has specifically denied that he ever had either knowledge or notice of the renewals.

The Lord Chief Justice left to the jury the question whether the defendant had notice of the renewals, and the jury found that

Appeal. the defendant knew the bills were due, but that he got no notice
1918. prior to the letter of the 8th January, 1915, of the renewals.

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There was some controversy as to what the jury in fact found, and a slight discrepancy between the note of the Lord Chief Justice and the Registrar's certificate was pointed out; and the attention of the Chief Justice having been drawn to the matter, he wrote a memorandum. [His Lordship read the memorandum and continued:] I find myself quite unable to read into the answers of the jury any intention to find that the defendant knew, in fact, of the renewals at the time they were respectively given, and if the jury so intended, I am quite unable to discover any evidence to support the finding. But in the view which I take of the case, even such a finding would not entitle the plaintiffs to judgment. It is clear from the case of *Polak v. Everett* (1) and the whole line of authorities that mere knowledge without consent is not enough, and, in my opinion, there is no evidence to which I could apply the provisions of Order 40, rule 9, and draw the inference of consent.

From a very careful consideration of the evidence I am satisfied that the defendant was entitled to the direction which he asked for at the trial, and that consequently the appeal should be allowed, with costs; and that the plaintiffs should also bear the costs of the trial and of the motion for judgment in the King's Bench Division.

Solicitor for the plaintiffs and respondents: *J. Tweedy.*

Solicitors for the defendant and appellant: *Fisher and Fisher & Hamilton.*

R. ST. J. C.

(1) 1 Q. B. D. 669.

MANTON, APPLICANT; CANTWELL, RESPONDENT (1).

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June 27.

Workmen's Compensation—Casual employment—Fatal accident—Repairing a farmer's residence—"Purposes of the employer's trade or business"—Workmen's Compensation Act, 1906 (6 Ed. 7, c. 58), sect. 13—Admission of liability to deceased workman—Liability to dependants—Estoppel.

A casual labourer engaged to repair the residence of a farmer is not a workman employed "for the purposes of the employer's trade or business."

An admission by an employer of his liability under the Workmen's Compensation Act to a workman who subsequently dies from the effects of injuries received in the employment, does not operate as an estoppel in an application by the dependants of the deceased for compensation under the Act.

APPEAL from an order of the County Court Judge of Tipperary, awarding the applicant £234 compensation.

Mary Manton, the applicant, was the widow of John Manton, who had been employed by the respondent to thatch his dwelling-house. The deceased, a civil-bill officer, was from time to time employed by farmers at thatching and other operations. On the 24th of May, 1917, he was employed by the respondent, a farmer, to thatch the house in which he resided. On the second day Manton fell from the roof, sustaining injuries which resulted in his death on October 27th, 1917.

An agreement, dated October 9th, 1917, signed by Patrick Cantwell, and on behalf of John Manton, and which had been filed in proceedings taken by Manton in his lifetime against the respondent for compensation under the Workmen's Compensation Act, was put in evidence. By this agreement Patrick Cantwell admitted that he was liable to pay compensation under the Workmen's Compensation Act to John Manton in respect of the injury caused by the accident, and he agreed to pay him half wages. Letters of administration granted to Mary Manton in respect of the goods of John Manton were also put in evidence.

It was contended on the part of the applicant that, by reason of the agreement, the respondent was estopped from denying liability, and that on proof that the death of John Manton was due to the accident, the Court was bound to award compensation. The County Court Judge held that as the present applicant was

Appeal. not a party to the agreement, and did not claim under it, there
1918. was no estoppel.

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It was contended on behalf of the respondent that Manton's employment was of a casual nature and otherwise than for the purposes of the employer's trade or business; that, therefore, he was not a workman within the Act; and that the applicant was not entitled to compensation. The learned judge held that Manton having been at the time engaged on repairs to the farmhouse where the respondent lived and carried on his business as a farmer, was employed for the purposes of the employer's trade or business.

Carrigan K.C. and Devitt, for the appellant:—

The deceased was employed in thatching the private residence of the appellant, and there is no evidence to show that the house was used in connexion with the business of farming. *Johnston v. Monasterevan General Store Co.* (1) and *Cotter v. Johnson* (2), authorities that would seem to support the applicant, were considered and distinguished by the Court of Appeal in England in *Alderman v. Warren* (3). No question of estoppel arises, because the right claimed by the applicant is not as representative of the deceased, but as a dependant under the Workmen's Compensation Act: *Williams v. Vauxhall Colliery Co.* (4).

Sealy K.C. and Murnaghan, for the respondent:—

The evidence shows that the accident arose out of an operation connected with the trade or business of the employer. Farming is not like a specialized trade, and thatching a house where a farmer has necessarily to reside to carry on his business is an employment for the purposes of the employer's trade or business. We rely on *Johnston v. Monasterevan General Store Co.* (1).

The employer is estopped by the agreement which was registered under Rule 9 of schedule 2 of the Workmen's Compensation Act, 1906, and is enforceable as a County Court judgment: *Fraser v. Driscoll* (5).

(1) [1909] 2 I. R. 108.

(3) 9 B. W. C. C. 507.

(2) 45 I. L. T. R. 259.

(4) [1907] 2 K. B., at p. 436.

(5) 9 B. W. C. C. 264.

In any event, there was ample evidence, treating the document as an admission and not as an estoppel, to warrant the finding of the County Court Judge.

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O'CONNOR M.R. :—

The deceased having been a casual labourer, the applicant in this case, in order to succeed, was bound to show that he was not employed "otherwise than for the purposes of the employer's trade or business." In this case the employer was a farmer; the employee was a kind of itinerant thatcher, and he was employed for the purpose of repairing the roof of the farmhouse in which the farmer dwelt. *Prima facie* the man was employed for the domestic purpose of the owner of that house; and it is not proved that he was employed for the purposes of the trade or business of the employer by showing merely that the person who dwelt in the house was a farmer. If we assented to such a proposition we should connect the employee of every person with the business of that person. The farmer with his family lived in this house, and it is clear that it was used by him as his private residence. That being so, the case is concluded. It might be otherwise if it could be shown that the deceased was employed in repairing an outoffice, shed, or place for cattle, because such buildings are used solely for farming purposes.

The applicant relies upon an agreement of October 9th, 1917, by which the employer admitted his liability to the deceased to pay him compensation under the Workmen's Compensation Act in respect of the injury caused by the accident, and agreed to pay him half wages. As between the employee who is dead and the employer, that would be an estoppel. The employer having made that admission, and the weekly payment by way of compensation having been made and accepted on the faith of the agreement, the employer could not, as against the deceased, during his lifetime repudiate liability; but he is dead, and on his death new claims sprang up under the Act: claims of persons called his dependants, who are given separate and independent statutory rights. Between them and the employer this agreement is inoperative; it cannot be relied upon as an estoppel, because an estoppel can only prevail *inter partes*. The corresponding proposition is that if the

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employee who has met his death had released the employer that release would not affect the rights of the dependants, and they would be entitled to pursue their remedy. Mr. Sealy and Mr. Murnaghan were entitled to rely upon the agreement as an admission; that is evidence which the County Court Judge might consider; but it is perfectly plain that this agreement was put forward not as evidence, not as a document containing an admission, but simply as a document which estopped the employer from disputing liability. The County Court Judge held quite rightly that it did not operate as an estoppel. He says:—"On the facts given in evidence as above set out, it was contended on behalf of the respondent that Manton's employment was of a casual nature and otherwise than for the purposes of the employer's trade or business, and that therefore he was not a workman under the Act, and the applicant was not therefore entitled to compensation. I held that Manton having been at the time engaged on repairs to the farmhouse where the respondent lived and carried on his business as a farmer, was employed for the purpose of the respondent's trade or business. On the whole case I held that the applicant was entitled to compensation." It is quite clear that the County Court Judge investigated the case independently of the document, and that he did not consider he was bound by it as an admission.

We think, having regard to the facts, that the building the deceased was engaged in repairing was the dwellinghouse of the employer, and that the deceased was not employed for the purposes of the business of a farmer, simply because the employer was a farmer and lived in the farmhouse which the deceased was engaged to repair.

RONAN L.J. :—

There are two questions in this case. The first is whether the man who met his death was, in fact, employed for the purposes of the employer's trade or business. Mr. Sealy has given a very wide definition of a farmer's business. According to him a small farmer in Ireland is a house repairer, a glazier, a veterinary surgeon, a carpenter, a physician, and a tailor—in fact, he carries on every ordinary trade. I am afraid that that is not the meaning of "employer's trade or business"; an employer cannot be

treated as a Jack of all trades. If repairing a person's dwelling-house is for the purpose of his trade, what about repairing his bed or boots? They, too, are essential for domestic purposes. I am of opinion that the applicant's husband was not employed for the purposes of the employer's trade or business, and that the decision of the Court below was wrong.

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The second question was argued with great force and precision by Mr. Murnaghan. He says we have jurisdiction to decide only matters of law, unless it can be shown that the County Court Judge has misdirected himself. He submits that, taking the facts found and the document admitting liability, there was evidence to justify him, on the whole case, in giving a decree for compensation, and that, therefore, we have no right to interfere with his decision, although our own view may be different. I do not think it can be seriously argued that the agreement was anything in the nature of an estoppel. Mr. Murnaghan relied upon sect. 9 of schedule 2, but that simply means that the original parties or parties claiming through them can enforce the memorandum.

The County Court Judge held that as the applicant was not a party to the agreement, and did not claim under it, there was no estoppel; and on the facts, apart from the agreement, he held that Manton, having been engaged on repairs to the farmhouse "where the respondent lived and carried on his business as a farmer, was employed for the purpose of the respondent's trade or business." In my opinion, that is a clear misdirection of himself by the judge, because on the evidence, apart from the document, he should not have come to that conclusion. There was no evidence from which the conclusion could be drawn that Manton was employed for the purposes of the trade or business of his employer.

MOLONY L.J.:—

I concur. In this case the County Court Judge held that, the deceased having been employed on repairs to the farmhouse in which the farmer lived, he was employed for the purposes of the employer's trade or business. There is no evidence that this house was used for any purpose other than as the dwelling-house of the farmer and his family. That fact does not make the house a place used in connexion with the farmer's trade or business.

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I do not think that this case comes within *Johnston v. Monasterevan General Store Company* (1), where it was proved that the premises were used wholly for the purposes of the employer's business, the upper portion being devoted to the accommodation of the assistants who worked in the shop. As regards *Cotter v. Johnson* (2) I think the report is rather unsatisfactory, and that it might be difficult to support the judgment in the form in which it is reported; and I am not surprised that in the English Court of Appeal it presented some difficulty to Lord Cozens-Hardy M.R. in the case of *Alderman v. Warren* (3). The judgment of Barry C. in *Cotter v. Johnson* (2) is reported in the Irish Law Times Reports as follows:—"Here we are all satisfied that this wall existed for no other purpose except to protect and shelter the employer's premises. The applicant was lopping trees which threatened to injure that wall when he fell and was injured. Under the circumstances we are satisfied that the case is ruled by *Johnston's Case* (3), and that the work on which he was engaged was work done for the purposes of the employer's business." The protection of the employer's premises might have no connexion with his business; and if the decision had that general application it could not be supported.

We have, however, had the advantage of reading the admirable report of the judgment contained in the Registrar's book, and we find that what Barry C. said, as it appears in Mr. De Versan's book was:—"In the present case I am satisfied the work was executed to serve the farm. It is not suggested it was for any other purpose. I am satisfied that the lopping of the trees was for no other purpose but to protect the wall which itself protected the produce. Therefore, it was intimately connected with the farmer's business." The Registrar's note gives the true ground of the decision, namely, that the work was intimately connected with the farming business. The phrase "to protect and shelter the employer's premises" in the report in the Irish Law Times is inaccurate.

In regard to the second question, Manton was alive when the document alleged to be an estoppel was prepared. He made a claim for compensation, and an agreement was entered into

(1) [1909] 2 I. R. 108. (2) 45 I. L. T. R. 259. (3) 9 B. W. C. C. 507.

between him and the employer, whereby the latter agreed to pay a certain weekly sum. The first paragraph of the agreement provides:—"That the liability of the said Patrick Cantwell to the said John Manton to pay compensation under the Workmen's Compensation Act, 1906, be and the same is hereby admitted." That agreement does not decide any question as regards the nature of the employment, whether it was permanent or casual. We have to remember that under the Act there are two separate and independent rights which may arise in respect of an accident to a workman. If the accident results in injury and not death, the workman himself is given a statutory right to compensation; if death results from the injury, the dependants of the workman are given a statutory right to compensation, not as personal representatives but as dependants. These two rights are entirely separate and distinct, and this point is put very plainly by Cozens-Hardy M.R. in *Williams v. Vauxhall Colliery Co., Ltd.* (1), where he says: "I wish to express my opinion that under this Act the dependants have a separate and independent right in the event of the workman's death in such circumstances—a right which the workman cannot deprive them of except in this sense, that the Act contemplates that the employer is not, from first to last, bound to pay more than the maximum compensation given by the Act, and is entitled to take credit for any sums advanced by way of weekly payments."

There is no evidence to support the finding of the learned County Court Judge which makes the employer in this case liable for compensation to the dependants. Consequently this appeal must be allowed.

Solicitor for the applicant: *L. J. Ryan.*

Solicitor for the respondent: *J. P. Carrigan.*

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(1) [1907] 2 K. B. 433, at p. 436.

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IN RE THOMAS HARRIS, A BANKRUPT (1).

June 25.

Bankruptcy—Composition—Offer of one shilling in pound—No objection by creditors—Absence of merits—“Reasonable and proper to be executed under the control of the Court”—The Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), sect. 61.

An offer by a bankrupt of a composition of one shilling in the pound, although accepted by the statutory majority of creditors, is not “reasonable and proper to be executed under the control of the Court” in the absence of evidence of merits.

APPEAL from an order of Pim J. refusing to pass the first sitting on the offer of composition made by the bankrupt, and directing that the bankruptcy be continued.

On September 25th, 1911, the debtor was adjudicated a bankrupt, and he did not file a statement of affairs until January 15th, 1918. The liabilities were returned at £213 15s. 6d., and the assets at £10 7s. 11d. The bankrupt made an offer of composition of one shilling in the pound to be paid in cash, and notice of the first meeting at which this proposal was to be submitted to the Court was sent to all the creditors for February 15th, 1918. The matter was adjourned until February 22nd, when the Court made an order that the Chief Registrar should ascertain whether all the creditors had agreed to accept the bankrupt’s offer. In pursuance of this order the Registrar reported that the amounts due to seven out of twenty-nine creditors returned in the statement of affairs were not stated; that eight creditors had lodged proofs of debt to a total amount of £180 8s. 5d., out of £213 15s. 6d. due to twenty-two creditors, and had supported the proposal. Only three of these creditors had proved debts amounting to £20 and upwards. One creditor had sent a proof of debt for £4 15s. 7d. to the official assignee, but had not signed any proxy in respect thereof. Four creditors

whose debts amounted to £19 0s. 8d. stated that they would not either consent to or refuse to accept the bankrupt's offer. One of the creditors returned said he had no account against the bankrupt. All the remaining creditors had failed to reply to any notices or letters sent them, although two of them had long ago sent in claims for small amounts to the official assignee. Having considered this report, Pim J. on April 19th, 1918, held that the offer of composition made by the bankrupt was not reasonable and proper to be executed under the control of the Court. He ordered that the bankruptcy do continue, and that the estate be immediately realized.

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M'Gonigal K.C. and *Devitt*, for the appellant:—

The offer of the bankrupt is supported by the necessary statutory majority, and no creditor opposes. The only opposition to the offer comes from the assignee. In these circumstances the Court should not have refused to pass the first sitting unless satisfied that there was something fraudulent in the conduct of the bankrupt, or that the creditors had not acted bona fide in accepting his proposal: *In re Fry* (1).

The learned judge held that the offer was not reasonable and proper to be executed under the control of the Court under sect. 61 of the Bankruptcy (Ireland) Amendment Act, 1872. There is no suggestion in the case that the bankrupt was dishonest or fraudulent; and the onus was upon the objecting party to give some specific evidence showing that the offer was not reasonable. The Court cannot act upon mere suspicion or guess. In *Ex parte Hudson*, *In re Walton* (2), the Court, in accepting an offer of one shilling in the pound, laid down that the question in all such cases was whether the creditors in assenting to the proposal had acted bona fide, that is in the interest of the creditors and not merely with a view to the benefit of the bankrupt. In *Ex parte Elworthy* (3) an offer of threepence in the pound was accepted; but in *Ex parte Staff* (4), where the procedure was a liquidation by arrangement, the Court refused to sanction a similar offer.

(1) [1913] 2 I. R. 273.

(2) 22 Ch. Div. 773.

(3) L. R. 20 Eq. 742.

(4) L. R. 20 Eq. 775.

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Lardner and Wylie K.C., for the respondent, the assignee:—

Section 61 of the Act of 1872 gives a wide discretion to the Court. In *Ex parte Williams* (1) the Court refused to register resolutions accepting a composition of twopence in the pound, though no creditor opposed registration. In this case evidence that the offer was not reasonable is supplied by the fact that the statement of affairs was not filed until more than six years after the adjudication, and that when filed it was not a real or satisfactory statement of affairs.

M'Gonigal, in reply.

O'CONNOR M.R.:—

This is an appeal from an order of Mr. Justice Pim, sitting in bankruptcy, by which he refused to approve of the offer of composition, and directed the bankruptcy to continue. The offer of composition was one shilling in the pound on debts which roughly amounted to £215. Mr. Justice Pim held that this offer was not reasonable and proper to be executed under the control of the Court, and the question for our determination is whether, considering the terms of sect. 61 of the Bankruptcy (Ireland) Amendment Act, 1872, he was right in so holding. The section provides that “notwithstanding that the several requirements of the 149th and 150th sections of the said Act [the Irish Bankrupt and Insolvent Act, 1857] with respect to composition after bankruptcy may have been complied with, it shall be lawful for the Court to refuse to annul the adjudication, and to order that the bankruptcy shall continue, if at either of the meetings mentioned in said 149th section, or at any adjournment of either of said meetings, it shall be shown that the offer of composition made by the bankrupt or his friends is not reasonable and proper to be executed under the control of the Court.”

The appellant contends that the onus of showing unreasonableness and impropriety rests upon the person who objects to the composition, and that in the absence of any evidence to that effect the Court is bound to hold that the offer is reasonable and proper

to be executed under the control of the Court. To a certain extent that proposition may be accepted; but, on the other hand, the composition itself may be of such a character as to afford prima facie evidence—unless there is something else in the case—that the offer is not reasonable and proper to be accepted. An offer of one shilling in the pound is unreasonable unless it be supported by some meritorious consideration. Indeed, an offer by a debtor to his creditor of part of his debt in satisfaction of the entire is an unreasonable proposition, unless it is made in special circumstances; and it is for the debtor making the offer to show the special circumstances if he wishes it to be regarded as reasonable. The smaller the composition offered, the greater the onus of proving reasonableness.

In the present case the debtor offers a composition of 1s.; but he does not show by any collateral evidence that he has got any merits; and in these circumstances the judge before whom the offer was brought was bound to hold that it was not reasonable. What are the facts? In 1911 this man was adjudicated a bankrupt. He was bound to file a statement of affairs which would give the Court the materials which would enable it to make the proper order. He does nothing; he waits until all the debts have grown so stale that they must have been carried by the creditors into the list of bad or doubtful debts. In fact, having starved the creditors and tired them out, he files his statement of affairs in January, 1918. So unsatisfactory was the statement that practically the only debts due to the bankrupt which the official assignee was able to recover were a few dividends payable to him out of another bankrupt estate, which was being administered in the Court of Bankruptcy. Only one other small debt was recovered. The bankrupt, by withholding a statement of affairs for seven years, deprived the assignee of the means of realizing the debts due.

I think Mr. Justice Pim was entitled, in determining whether the offer was reasonable or unreasonable, to consider the whole history of the case; and I think his mind, like mine, would be affected by the fact that the statement of affairs was held back for such a long time that the creditors were precluded from pursuing their rights. As the offer was not supported by any

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evidence of merits, Mr. Justice Pim was justified in holding that it was not reasonable and proper to be accepted under the control of the Court.

RONAN L.J.:—

I concur. In my opinion the words of the section, “reasonable and proper to be executed under the control of the Court,” cast on the judge the duty of ascertaining whether the offer is reasonable and proper to be executed under the control of the Court. I asked Mr. M’Gonigal whether he considered an offer of one penny in the pound was one that should be executed under the control of the Court, and his answer was that a sum of three-pence might be a reasonable offer. If I were sitting as a judge of first instance, it would be very hard to satisfy me that an offer of threepence in the pound would be proper and reasonable to be executed under the control of the Court. Once the question becomes one of more or less, all the circumstances must be taken into consideration. It was the duty of Mr. Justice Pim to consider all the circumstances. In my opinion he had ample jurisdiction to exercise his discretion in this case as he did, and this Court ought not to interfere with the order he made in the exercise of that discretion.

MOLONY L.J.:—

I agree, and substantially for the same reasons as those given by the Master of the Rolls. Mr. Justice Pim had to consider whether he should pass the sitting or order the bankruptcy to continue, and in order to arrive at a decision it was necessary for him to consider whether it was shown under section 61 of the Bankruptcy (Ireland) Amendment Act, 1872, that the offer of composition was one reasonable and proper to be executed under the control of the Court. In considering that question he was entitled to refer to all documents in the case and to any evidence before the Court at the time. There does not appear to have been any oral evidence; but so far as the documents are concerned he was entitled to have regard to the fact that this man was adjudicated a bankrupt as far back as 1911, and that no statement of affairs was filed until 1918. There was no evidence

showing what his occupation or business was in the meantime. I would be very slow to hold that there should be a hard and fast rule in regard to offers of composition, and although the sections involved are not analogous, the view expressed by the English Court of Appeal in *Ex parte Hudson, Re Walton* (1) is of some value in considering a case like the present. In that case it was laid down that there could be no hard and fast rule as to the amount of composition which might be accepted in a particular case, except that the sum should not be so small that no reasonable person would in the circumstances accept it. The present case was argued before us as if there was a hard and fast rule in the Bankruptcy Court that an offer of one shilling in the pound must as a matter of course be refused. There is no such rule, and I do not think such a rule could be supported. But when a dividend so small is offered, the Court is entitled to look into all the circumstances to see whether the offer is reasonable. In the present case, having regard to the facts that the adjudication took place in 1911, that no statement of affairs was filed until 1918, and that when filed it was unsatisfactory in many respects, I think the judge had evidence upon which in the exercise of his discretion he was warranted in refusing to pass the first sitting, and in ordering that the bankruptcy should continue. The order does not, however, exclude the bankrupt from bringing forward an amended offer.

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Solicitors for the appellants: *Horan & Devine*.Solicitors for the respondents: *Bennett Thompson and McNeill*.

C. L.

(1) 22 Ch. Div. 773.

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BANKRUPTCY—ORDER AND DISPOSITION—Lease of horse—*Reputed ownership—Lessor's chattel in bankrupt's possession—Custom of particular business or trade—Bankruptcy Act, § 857 (20 § 21 Vict. c. 60), s. 313.* *L.* was the owner of a racehorse, and on the 9th September, 1916, leased it to the bankrupt for three years on the terms that he should stable and keep the horse, and pay all expenses of running him, and that *L.* should receive half the stakes won. The lease was registered in accordance with Racing

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and Hunt Rules to that effect, and the details of such registration appeared in the Irish Racing Calendar for the information of parties interested in turf matters. It was proved that the practice of leasing racehorses was common and well known to persons concerned in or interested in horse racing. The horse (whose winnings were considerable) had been raced by the bankrupt in his own name, and was in his actual possession at the date of his bankruptcy, and during the currency of the lease. *Held*, that the bankrupt was not the reputed owner of the horse within the meaning of section 313 of the Irish Bankrupt and Insolvent Act, 1867. *In re Mahon, a bankrupt* [K.B.D. 460]

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See JUSTICES—JURISDICTION (PETTY SESSIONS).

BREAD—Bread Order, 1917, No. 189—Sale of bread by weight - - - 398
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CASES—*Allen v. Carroll*, [1911] 2 I. R. 190, applied - - - -
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— *De Beers Consolidated Mines, Ltd., v. Howe*, [1906] A. C. 455, distinguished - 34
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— *Dennis v. White*, [1917] A. C. 479, followed [467]
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— *Dobb v. Dobb*, [1918] 1 Ch. 443, followed [455]
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— *Flannery v. Waterford and Limerick Railway Company*, I. R. 11 C. L. 30, followed [306]
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— *Hanrahan v. Ardnamult Steamship Company*, 22 L. R. Ir. 55, doubted - - 306
See NEGLIGENCE.

— *King-Harman's Estate*, [1908] 1 Ir. R. 202, considered - - - - 1
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— *Larkin v. Belfast Harbour Commissioners*, [1908] 2 I. R. 214, followed - 432
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— *O'Hara, In re*, [1900] 2 I. R. 232, distinguished - - - - 98
See INFANT—CUSTODY.

— *R. (Roche) v. Cork Justices*, 46 I. L. T. R. 80, followed - - - - 116
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— *Scott v. The London and St. Katherine Docks Company*, 3 H. & C. 596, followed 306
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CONSULTATION—Fee for, to settle affidavit of discovery - - - - 228
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DECISION OF JUSTICES—Based on different grounds—Validity - - 63
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DEFECTIVE GEAR ON SHIP - 306, 313
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DISMISS—Not stated to be “without prejudice” or “on the merits” - 347
 See **JUSTICES — JURISDICTION (PETTY SESSIONS)**. 2.

EASEMENT—Privilege under sect. 34, Land Law Act, 1896, sect. 34 - - 1
 See **LAND PURCHASE ACTS—PRIVILEGE**.

ESTOPPEL—Admission by employer of liability to deceased workman - - 563
 See **WORKMEN’S COMPENSATION**. 2.

EVIDENCE—Onus of proof - 306, 313
 See **NEGLIGENCE**.
 — Opinion of jury formed on inspection of defective gear - - 306, 313
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 — Right to call, as cause against order to find sureties of peace and for good behaviour [94
 See **JUSTICES — JURISDICTION (PETTY SESSIONS)**. 4.

EXECUTION FOR COSTS - - 455
 See **WAR—EMERGENCY LEGISLATION**.

FELONY—Failure to prosecute—*Assault—Civil action—State of proceedings—Judicial discretion—Excuse for not prosecuting—Prosecution after verdict.* The rule that where a plaintiff sues in respect of a wrong which is a tort and also a felony, the defendant should be prosecuted in respect of the felony before the civil action is

FELONY—*continued.*

heard, does not make such criminal prosecution an indispensable condition precedent to the right to maintain the civil action. In its modern application the rule is merely suspensory of the civil rights, and is subject to the exercise of judicial discretion. In exercising such discretion the Court may consider circumstances, such as the infancy, ignorance, or poverty of the plaintiff, which may afford excuse for the failure to prosecute in respect of the felony. Where the plaintiff has obtained a verdict in the civil action, the Court, on motion for a new trial or for judgment, may consider the circumstance that between verdict and motion the defendant has been prosecuted in respect of the felony. *Wells v. Abrahams*, L. R. 7 Q. B. 554, followed. *Carlisle v. Orr* (No. 2) K. B. D. 442

FOOD CONTROL—Bacon, ham, and lard (provisional prices)—“Accurate Records” [395

See **WAR—EMERGENCY LEGISLATION**.

— Bread—Selling bread by weight - 398

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HABEAS CORPUS—Right of mother to custody of Infant—Abandonment 98
 See **INFANT—CUSTODY**.

INDEMNITY—Conditional undertaking to pay debt - - - - 521
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 See **PRACTICE—WRIT OF SUMMONS**.

INFANT—CUSTODY—Right of mother—*Abandonment—Habeas Corpus—Custody of Children Act, 1891 (54 Vict. c. 3).* A mother, by profession a hospital nurse, who had no permanent home (the residence of the father being unknown), claimed the custody of her son aged thirteen years, who with her consent had long resided with her sister. She intended to take her son to reside with her in a foreign country. The Court examined the boy in chamber, and, being of opinion that it was for his benefit to leave him in his present custody, refused the mother's application for a writ of habeas corpus. *In re O'Hara*, [1900] 2 I. R. 232, distinguished. *In re Boyd*. K. B. D. 98.

INTERROGATORIES.

See **PRACTICE—INTERROGATORIES**.

INVESTMENTS—Company whose principal business consists in making - 510
 See **REVENUE—EXCESS PROFITS DUTY**.

IRISH LAND COMMISSION—Ejectment by,
for non-payment of rent by tenant failing
to sign purchase agreement 231, 244
See LANDLORD AND TENANT ACTION FOR
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JUDGE'S CHARGE—Shorthand note of
[361, 377.

See PRACTICE—EVIDENCE.

JUDICIAL OR QUASI-JUDICIAL ACTS—
Grant of superannuation allowance to
poor law officer - - - 258
See PRACTICE—CERTIORARI.

1. JUSTICES — JURISDICTION (PETTY SESSIONS)—Ejectment—Stable and car-house—*Summary Jurisdiction (Ireland) Act*, 1851 (14 & 15 Vict. c. 92), s. 15—"House." The owner or occupier of premises consisting of a house, yard, stable, and car-house, can eject his sub-tenant of the stable and car-house under section 15 of the *Summary Jurisdiction (Ireland) Act*, 1851 (14 & 15 Vict. c. 92), although the sub-tenant does not use either building for the purposes of human habitation. *Fulham v. Caulfield* - - - K. B. D. 405

2. JUSTICES — JURISDICTION (PETTY SESSIONS)—Form of Order—Omission to state whether dismiss "without prejudice" or "on the merits"—*Sessions Act—Certiorari—Prosecution by Police constable—Power to give costs against—Petty Sessions (Ireland) Act*, 1851 (14 & 15 Vict. c. 93), s. 21.] An order of dismissal under sect. 21 of the *Petty Sessions (Ireland) Act*, 1851 (14 & 15 Vict. c. 93), is not invalid because it does not state whether the dismissal is "without prejudice" or "on the merits." The provision of the section requiring this to be stated is merely directory. Where a police constable sues as a common informer, there is jurisdiction to give costs against him, but in most cases the Court ought not to take this course. *R. (Wilbong) v. Armagh Justices* (1) - - - K. B. D. 347.

3. JUSTICES — JURISDICTION (PETTY SESSIONS)—Refusal to adjourn complaint *Petty Sessions (Ireland) Act*, 1851 (14 & 15 Vict. c. 93)—Improper exercise of discretion as to adjournment—Imposing costs as a condition to adjournment—*Certiorari*—Court improperly constituted—Bias—Failure to object at hearing to the constitution of Court—Presumption of waiver rebutted by proof of surprise—Reasonable time for preparing defence—Costs against justices.] *Certiorari* lies to quash a decision of justices on the ground that the justices improperly exercised their discretion as to the adjournment of the complaint. *R. (Roche) v. Cork JJ.* (46 I. L. T. R. 80)

JUSTICES—*continued.*

must be taken as conclusively establishing that, in all cases coming under the provisions of the *Petty Sessions (Ireland) Act*, 1851 (14 & 15 Vict. c. 93), justices cannot impose the payment of costs as a condition to an adjournment of the complaint. *Quære*, whether such conditional adjournment can be granted by consent of the parties. There is no absolute rule of law that a party cannot challenge a decision of justices on the ground of bias or suspicion of bias where the objection on either ground was present to his mind at the hearing before the justices and was not then made by him or on his behalf. In such case there is a *presumptio juris* of waiver of the objection to the constitution of the court, but this presumption of waiver may be rebutted by proof that the party was prevented by surprise from taking the objection before the justices, either by reason of their improper conduct or neglect of the essentials of justice. *R. (Harrington) v. Chairman and Justices of Clare*. *R. (Harrington) v. Justices of Clare*

[K. B. D. 116

4. JUSTICES — JURISDICTION (PETTY SESSIONS)—Sureties for peace and good behaviour—*Inherent Jurisdiction—Right of person showing cause to call evidence—Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58).] The provisions of sect. 43, sub-s. 13, of the *Criminal Justice Administration Act*, 1914, 4 & 5 Geo. 5, c. 58, do not apply where justices, by virtue of the jurisdiction inherent in them under their commissions, bind an individual with sureties to keep the peace and to be of good behaviour. The Act and section only apply to courts of summary jurisdiction, and in every case it is a question of fact whether justices so binding acted as such court or under their commissions. Only when acting as such court are they bound to allow the person brought before them to call evidence, and to admit that person to bail, and send forward the complaint for trial at the next *Petty Sessions*. *R. (Garvey) v. County Armagh Justices* - - - K. B. D. 94
[Overruled in *R. (Redmond) v. Jellett*, K. B. D., 5th Nov., 1918.]

5. JUSTICES — JURISDICTION (PETTY SESSIONS)—Title ousting jurisdiction—*Prosecution under Public Health (Ireland) Act*, 1878 (41 & 42 Vict. c. 52), sect. 107, sub-s. 2—*Nuisance—River—Sewer*.] A contention, however well founded, that a river being in fact a sewer within the meaning of the *Public Health (Ireland) Act*, 1878 (41 & 42 Vict. c. 52), is, therefore, vested in the sanitary authority, is not a *bona fide* question of title, ousting the jurisdiction of justices to hear and determine a prosecution for nuisance arising

JUSTICES—continued.

out of the river, brought by the sanitary authority against the person *prima facie* the "owner" of the river within the meaning of that statute. The sanitary authority of D., through the appellant, their town clerk, brought a prosecution under sect. 107, sub-s. 2, of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), against the respondent, who was the agent of the person *prima facie* owning a river flowing through D., charging the existence of a nuisance arising out of the flooding of the river. At the hearing before the justices the respondent contended that in fact by user the river was a sewer within the meaning of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), and was, therefore, vested in the sanitary authority. The justices, having heard evidence as to the user of the river, held that there was a *bona fide* and reasonable dispute as to the river being a sewer, and that such dispute constituted a *bona fide* claim of title, which ousted their jurisdiction. On case stated, *held*, that the justices were wrong in law, and that they were bound to decide, first, whether the nuisance charged came within the statute under which the prosecution was brought, and in fact existed; if there was a nuisance within that statute, whether the defendant was the person who was owner of the river or responsible for the nuisance within the meaning of the statute; and that, in deciding the latter question, the justices were bound to decide whether the user of the river was such as to convert it into a sewer, under the control of the sanitary authority. *Comerford v. Turner*. K.B.D. 207

6. JUSTICES—JURISDICTION—(PETTY SESSIONS)—Trivial offence—*Extenuating circumstances—Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 1, sub-s. 1—Conditions therein alternative not cumulative—Decision of individual justices based on different grounds—Defence of the Realm Regulation 9B.* A defendant was charged at Petty Sessions with having taken part in exercise and drill of a military nature in contravention of the Defence of the Realm Regulation 9B. The evidence for the prosecution was not contradicted, and no evidence was given for the defence. The Court, which consisted of three justices, differed in its conclusion; one justice being of opinion that the charge was proved, and that the defendant should be convicted; one justice found that the defendant took part in military evolutions of some kind, but dismissed the charge as being trivial; and the remaining justices concurred in dismissing the charge, but upon the ground "that the members of the procession were doing nothing more on this occasion than others had done before and after the date charged."

JUSTICES—continued.

Accordingly, the case was dismissed on the merits by the majority of the Court. *Held*, that there were no facts in evidence before the justices entitling them to hold that the offence, which was a serious one, was in the particular case trivial in its character. *Held* also (assuming but not deciding that failure on the part of the Executive to prosecute other persons in *pari delicto*, or discrimination in favour of others who had committed the same offence in an aggravated form, might entitle a Court of summary jurisdiction, in pursuance of s. 1 of the Probation of Offenders Act, 1907, to dismiss a charge on the ground either of extenuating circumstances *per se*, or that by reason of such circumstances the offence was trivial in its nature), inasmuch as no evidence of such failure or discrimination had been given at the hearing, that the justice, in having regard to such matters *ex informata conscientia*, was acting without and in excess of jurisdiction. *Held* also, that the three conditions upon which the exercise of the jurisdiction conferred by s. 1 of the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), is made to depend are alternative and not cumulative. *Held* also, that where it is open to justices to dismiss a complaint upon any one or more of several grounds, their decision to dismiss is not necessarily vitiated merely by the fact that the justices in so deciding do so upon different grounds, provided that there were facts in evidence before them to justify their individual conclusions. *McClelland v. Brady*

[K.B.D. 63]

LANDLORD AND TENANT—ACTION FOR RECOVERY OF LAND—Irish Land Commission as Landlords—Estate purchased by Irish Land Commission—Tenant failing to sign undertaking to purchase his holding—Non-payment of rent—Remedy—Powers—Irish Land Act, 1903 (3 Ed. 7, c. 37), sects. 6, 18, and 19.] Where the Land Commission acquire an estate under sect. 6 of the Irish Land Act, 1903, they may, exercising the powers of landlords, proceed against a tenant who has failed to sign an undertaking to purchase his holding, by way of ejectment for non-payment of rent. *Irish Land Commission v. Forde*

[K. B. D.; App. 231, 244]

LANDLORD AND TENANT—NOTICE TO QUIT—Notice by equitable owner invalid.] A purchaser, whether in the open market or from the Land Judge's Court, who between the payment of the purchase-money and the execution of the conveyance, serves in his own name a notice to quit on a tenant of the lands purchased, cannot by such notice validly determine the tenancy. In such circumstances the notice to

LANDLORD AND TENANT—continued.

quit, to be valid, should be signed by both the vendor and purchaser or, at all events, by the purchaser as the expressly authorized agent of the vendor. *Graham v. M'Ilwaine* - K. B. D. 353

LANDLORD AND TENANT—RATES—

Poor-rate—Agreement to deduct from rent—*Estoppel—Res judicata—Local Government (Ireland) Act, 1898, sect. 52, sub-s. 2.*] By an agreement in writing dated 1st September, 1908, *M.*, a tenant, agreed to take from *B.*, a landlord, a large portion of a business house in the city of Dublin for a term of thirty-one years from 1st January, 1909, at the yearly rent of £240, including all rates and taxes at present existing or assessed on said premises." For some years subsequently to the date of the said agreement, the tenant's claim to credit for poor rates, as well as for other rates, had never been disputed. In certain mortgage proceedings between the parties in the Chancery Division, and in proceedings for rent in the King's Bench Division, the landlord's obligation was admitted, but subsequently the landlord *B.* refused to allow the tenant credit for the poor rates, part of the entire rates of the premises, relying on sect. 52, sub-s. 2, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37). In an action for rent in which the tenant pleaded that he was entitled to credit for the poor rates paid by him: *Held* (per Gibson and Kenny JJ., Madden J. diss.), that the tenant was entitled to credit for the poor rate paid by him. (Per Gibson J.), that there is nothing in sect. 52 of the Local Government (Ireland) Act, 1898, to preclude the landlord at the time a tenancy is created from undertaking liability for poor rate; also that the landlord was estopped. (Per Kenny J.), that the Court was bound by the decisions of the Court of Appeal in *Bryans v. Callaghan*, 42 I. L. T. 97, and *Allen v. Carroll*, [1911] 2 I. R. 190. (Per Madden J. diss.), that sect. 52, sub-s. 2, of the Local Government (Ireland) Act, 1898, made the contract between the parties void. *Bradshaw v. M'Mullan* - - - - K. B. D. 479

LANDLORD—Irish Land Commission as, ejectment by - - - - 231, 244
See LANDLORD AND TENANT—ACTION FOR RECOVERY OF LAND.

LAND PURCHASE ACTS—PRIVILEGE—

EASEMENT—Prescription—Land Law (Ireland) Act, 1896, sect. 34, sub-s. 1.] A privilege cannot become an easement under sect. 34, sub-s. 1, of the Land Law (Ireland) Act, 1896, unless it has been enjoyed for such a time that (apart from its having been enjoyed by consent of the landlord) it would have become a valid easement. (Per Kenny and Gordon JJ., Gibson J. diss.), such enjoyment must throughout the whole

LAND PURCHASE ACTS—continued.

period have been upon the particular holding in respect of which it is claimed. *Semble* (per Kenny J.): An ambulatory privilege given by the lessor is not within the section. *King-Harman's Estate*, (1908) 1 I. R. 202, considered. *Callinan v. McMahon* (1) - - - - K. B. D. 1

LEASE OF HORSE—Reputed ownership 460

See BANKRUPTCY—ORDER AND DISPOSITION.

LIBEL—Interrogatories asking for names of informants - - - - 411

See PRACTICE—INTERROGATORIES.

LICENCE, CHARGE ON—Rights to receive

beer—Output of Beer (Restriction) Act, 1916, (6 & 7 Geo. 5, c. 26), sect. 5.] Licence-holders have, under section 5 of the Output of Beer (Restriction) Act, 1916, certain rights to obtain beer. A licence-holder who became bankrupt had rights under the said section. These rights were from time to time sold by the assignees in bankruptcy, and the proceeds brought into the bankruptcy matter. Chargeants, whose charges were well charged on the licence and licensed premises, having claimed that their charges were also well charged on the proceeds of the sale of these rights: *Held*, that the charges did not extend to such proceeds, but *Semble*, on a sale of the licence and licensed premises, the charges extend to the proceeds of the sale of rights accruing subsequent to the sale of the licensed premises. *In re Carr* [K. B. D. 448]

LOCAL GOVERNMENT — MEDICAL

OFFICER, appointment of—Discretion of Local Government Board—Extraneous considerations—Jurisdiction—Poor Relief (Ireland) Act (14 & 15 Vict. c. 68), s. 8.] The *L. Guardians* appointed *C.*, a man of military age, to be medical officer of the *T.* dispensary district. The Local Government Board refused to sanction his appointment "in view of the constant and increasing need for the services of medical men with His Majesty's forces." *Held*, that the Local Government Board, if satisfied that adequate medical relief for the sick poor was secured, might in the exercise of the discretion conferred on them by sect. 8 of the Poor Relief (Ireland) Act, 1851 (14 & 15 Vict. c. 68), require that the appointment of medical officers during the war should be confined to persons over military age. The Court being satisfied that in the present case the Local Government Board had exercised their discretion with due regard to the needs of the sick poor, *held*, that the action of the Board could not be questioned on the ground that they also had taken into consideration the national and military exigencies arising from the war. *R. (Keelan & Carragher) v. Local Government Board*, 5 N. I. J. R. 81,

LOCAL GOVERNMENT—continued.

applied. *Quære*, whether the Local Government Board in exercise of such discretion are not acting administratively and not in a judicial capacity. *R. (Lismore Guardians) v. The Local Government Board* - - - K. B. D. 131

LOCAL GOVERNMENT—MEDICAL OR SURGICAL RELIEF—"Inmate of the workhouse"—*Destitute poor person—Poor person—Poor Relief (Ireland) Act, 1862 (25 & 26 Vict. c. 83) s. 7.*] The words "any inmate or inmates of the workhouse," in sect. 7 of the Poor Relief (Ireland) Act, 1862 (25 & 26 Vict. c. 83), are confined in their interpretation to the destitute poor, and do not extend to persons who, although poor, are not destitute, and have been admitted to the workhouse infirmary for temporary medical or surgical relief. *R. (Kennelly and Others) v. Browne* - - - K. B. D. 181

LORD LIEUTENANT—Power of - 103
See PETTY SESSIONS CLERK.

MACHINERY—Not erected or used for the production of motor power—Revenue—Valuation,
See REVENUE—VALUATION. [56]

MALICIOUS INJURY—Apportionment of compensation on adjoining counties—*Exclusive charge on county where injury did not take place—Invalidity—Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116)—Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37)—County Court Rules, 1899.*] On an application for compensation for malicious injuries brought under the adapted provisions of sect. 140 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Will. 4, c. 116), where the injury has been done at a place within the distance of one mile of the boundaries of two counties, the power given to the Court to apportion the burden of compensation between such counties is not properly exercised by a decree which imposes that burden exclusively on the county in which the injury was not done, and such a decree is invalid. Where the award is less than £100 there is no jurisdiction in the Court to direct that sum to be levied off the county at large. *R. (McCarthy) v. Cork County Council*

[K. B. D. 20]

MASTER AND SERVANT—Scope of employment—*Tort—Servant firing at and killing poacher.*] Except, possibly, in cases of fraud, the tortious act of a servant cannot be within the scope of any implied authority, unless the act of the servant was one which the master might legally have done. Where a servant is entrusted by his master with the doing of a certain class of acts, which, in an emergency involving personal danger, may give occasion for sudden action and prompt decision, the servant cannot make his master responsible for an act which the servant

MASTER AND SERVANT—continued.

considered he was entitled to do by reason of facts which he, honestly but mistakenly, believed to exist, if the master in the supposed state of facts could not lawfully have done the same act. *C.*, employed by the defendant as a "watcher to prevent poaching," saw the plaintiff's son and two other men poaching his master's river with a net. *C.* ran towards them, and fired a revolver shot at about 85 yards from the poachers, and another from a distance of about 30 yards from them. The first shot was apparently fired in the air, and the second apparently hit the plaintiff's son, who in fact died as the result of a revolver wound received on the occasion. The defendant had not supplied *C.* with arms or ammunition, or money for the purchase of arms or ammunition. In an action under Lord Campbell's Act (9 & 10 Vict. c. 93) by the plaintiff, the judge directed in defendant's favour on the ground that there was no evidence that *C.*, in firing the revolver, was acting within the scope of any authority as a servant of the defendant. *M'Namara v. Sligo, Marquess of* - - - K. B. D. 215

MEDICAL OFFICER—Appointment of, of military age - - - 131
See LOCAL GOVERNMENT—MEDICAL OFFICER.

MEDICAL OR SURGICAL RELIEF—*Destitute poor person* - - - 181
See LOCAL GOVERNMENT—MEDICAL OR SURGICAL RELIEF.

MONEY-LENDER — Re-opening closed transactions—*Lapse of time—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1.*] A defendant was sued by a firm of registered money-lenders for the balance due on foot of a promissory note dated the 5th of April, 1916. With his defence he paid money into Court (which was drawn out by the plaintiffs in full satisfaction of their claim), and counter-claimed to have five former transactions dated in February, 1911, March, 1912, February, 1913, March, 1914, and March, 1915, respectively, re-opened on the ground that they formed one and the same transaction, that the rates of interest charged therein were excessive, and that the transactions were harsh and unconscionable. Each of the five former transactions had been closed at the end of its respective year without any objection by the defendant. *Held*, that in the absence of any active malpractice, deception, or unfair pressure on the part of the plaintiffs, it was impossible to re-open dealings voluntarily settled so long ago. *Stone v. Hamilton* K. B. D. 193

MOTHER—Right of, to custody of infant. Abandonment - - - 98
See INFANT—CUSTODY.

NATIONAL INSURANCE—Offence—Failure to give information—Wilful failure—1 & 2 Geo. 5, c. 55, s. 112, sub-s. 3—Construction of Statute—Punctuation.] The word “wilfully” in p. 112, sub-s. 3, of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), governs and applies to the words “fails to give such information or to produce such documents as aforesaid.” A conviction under this sub-section which omitted to find the defendant guilty of “wilfully” failing to give information held bad. *R. (O'Connor) v. the Justices of the County of Kerry* (1) K. B. D. 452

NEGLIGENCE — Shipowner — Defective gear on ship—Duty of shipowner in relation to persons unloading ship—Misdirection.] The defendants, owners of a steamship, chartered their vessel for the carriage of coal to Cork. Under the charter-party the cargo, which was consigned to the Cork Gas Company, was to be discharged by the steamer giving the use of steam-winch, gear, and sufficient steam. The consignees of the cargo employed *H.*, a stevedore, to discharge the cargo. This was done, by direction of *H.*, by working both steam-winch of the vessel on the derrick attached to the foremast, one winch being used for hoisting, and the other for swinging the derrick. There was no arrangement on the ship for swinging the derrick when the ship was handed over to *H.*, and the derrick could have been swung by employing two men with ropes. Shortly after the discharge of the cargo had commenced the forestay snapped, and the foremast fell, breaking close to the deck. As a result the derrick fell into the hold, and killed *C.*, an employee of *H.* In an action under Lord Campbell's Act by *C.*'s wife against the defendants it was proved that the stay and mast were rotten, and pieces of each were inspected by the jury. Evidence was given that the defective state of neither the stay nor the mast was visible before the accident, and that the ship, two years before the accident, had been passed as sound and perfect on Lloyd's survey. The judge at the trial directed for the defendants on the ground that they were only under a duty to use reasonable care to see that the appliances were in fit and sound condition, and that on the evidence no precaution was suggested or proved that would have discovered the defect owing to which the accident occurred. *Held*, by the Court of Appeal (1), affirming the judgment of the King's Bench Division (2), granting a new trial, that the jury might form their own opinion on the state of the stay and mast from inspection, that there was sufficient evidence to go to the jury, and that the case should not have been withdrawn by the learned judge. Where an accident results from defective condition of plant, the burden of disproving the negligence lies on the person respon-

NEGLIGENCE—continued.

sible for the defect. *Scott v. The London and St. Katherine Docks Co.* (3 H. & C. 596), and *Flannery v. Waterford and Limerick Railway Co.* (1. R. 11 C. L. 30), followed; *Hanrahan v. Ardnamlut Steamship Co.* (22 L. R. Ir. 55) doubted. *Coughlan v. Monks & Co., Ltd.*

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NEW TRIAL MOTION—Consultation prior to, fee allowed between party and party - - - - - 228
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NOTICE TO QUIT—By equitable owner, invalid - - - - - 353
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OFFER OF COMPOSITION—One shilling in the pound—Reasonableness - 570
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OFFICE HELD AT PLEASURE—Discretion to determine - - - - - 103
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PETTY SESSIONS.
See JUSTICES JURISDICTION (PETTY SESSIONS).

PETTY SESSIONS CLERK—Limits of age of Candidates—Petty Sessions Clerk (Ireland) Act, 1858 (21 & 22 Vict. c. 100), sects. 7, 8, 29—Power of the Lord Lieutenant—Mandamus—Office held at pleasure—Absolute discretion to determine such office.] Section 29 of the Petty Sessions Clerks (Ireland) Act, 1858 (21 & 22 Vict. c. 100), gives the Lord Lieutenant full power to prescribe limits of age for candidates for the post of Petty Sessions clerks. Where an individual or department, during whose pleasure an office is held, declares the tenure of that office shall cease, no Court has jurisdiction to examine or investigate into the reasons, good or bad, which led to that declaration, once, in fact and without condition, the tenure of the office has been determined. *Brady v. The Queen* (3 N. I. J. R.) 279, applied. *R. (M'Morrow) v. Fitzpatrick* - K. B. D. 103

PICKETING.

See TRADES DISPUTE - - - 432

POOR LAW.

See PRACTICE—CERTIORARI.

POOR RATE—Agreements to deduct—Validity. [479

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POOR RELIEF—Destitute poor person 181
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PRACTICE — CERTIORARI—Judicial or quasi-judicial acts—*Local Government*—Poor law guardians—*Superannuation allowance*—*Union Officers Superannuation (Ireland) Acts, 1865 and 1872 (28 & 29 Vict. c. 26, and 35 & 36 Vict. c. 89)*—*Local Government Board (Ireland) Act, 1872 (35 & 36 Vict. c. 69)*—*Union Officers (Ireland) Act, 1885 (48 & 49 Vict. c. 80)*—*Resolution by guardians—Want of evidence—Local Government Board—Consent—Consent to invalid resolution—Order without jurisdiction—Consent varying amount of allowance—Excess of jurisdiction—Conditional order—Application—Affidavit—Uberrima fides.*] When the power to do an act is vested in a public body or department, and necessarily implies the determination of the existence of facts and conditions under which the power is exercisable, such body or department in exercising such power acts in a judicial or quasi-judicial capacity, and must decide on the existence of such facts or conditions on relevant and material evidence, though not necessarily under the strict rules of evidence binding judicial tribunals proper. Any such act which is done without any or sufficient evidence of the kind mentioned is reviewable, and can be quashed on certiorari as made without and in excess of jurisdiction. The jurisdiction to grant superannuation allowances to officers of poor law unions, conferred on poor law guardians by the *Union Officers Superannuation (Ireland) Acts, 1865 to 1872 (28 & 29 Vict. c. 26, and 35 & 36 Vict. c. 89)*, and the *Union Officers (Ireland) Act, 1885 (48 & 49 Vict. c. 80)*, and the jurisdiction conferred on the *Local Government Board for Ireland by the above statutes and the Local Government Board (Ireland) Act, 1872 (35 & 36 Vict. c. 69)*, to consent to the grant of such allowances, depend in their exercise upon the existence of the statutory conditions under which such allowances can be made. A grant made without evidence of or materials for the determination of the existence of such conditions is ultra vires, and made without and in excess of jurisdiction, and the *Local Government Board* cannot by their consent give effect to such invalid grant. The jurisdiction to consent to the grant of such allowance conferred by the above statutes on the *Local Government Board* is merely jurisdiction to give or refuse consent, and an order of the Board consenting to the grant, but varying the amount granted, is made in excess of jurisdiction. Nine persons, described as ratepayers in the union, obtained a conditional order for a certiorari to bring up and quash a resolution of the poor law guardians granting a pension to a former master of the workhouse of the union. Six of the prosecutors were also guardians, and were present at the meeting at which the resolution impeached was passed unanimously. This fact was not expressly

PRACTICE—continued.

stated in the affidavit grounding the application for the conditional order; but that affidavit set out fully the history of the case, exhibited the minutes of the meeting, showing the names of the six prosecutors as present, and stated that at a subsequent meeting, at which two of the prosecutors were present, a protest was entered against the consent of the *Local Government Board* to the grant of the pension. *Held*, 1, that even if there was a want of uberrima fides as regards the six prosecutors who were guardians, and voted the grant, that could not affect the three remaining prosecutors, and the order could be amended, if necessary, by striking out the names of these six prosecutors; and, 2, that on the facts it was impossible to conclude that there was any desire or motive to deceive, and there was no lack of uberrima fides on the part of the prosecutors. *Rex (Bryson) v. The Guardians of Lisanaskea Union*

[K.B.D. 258]

PRACTICE—EVIDENCE—Previous Statement by witness — Cross-examination — *Fabrication alleged against witness—Admissibility—New trial motion—Order 39, rule 7—Exclusion of shorthand note of Judge's charge to jury.*] In a suit to establish a will one of the witnesses for the defendants stated that the will was written immediately after the death of the deceased, that he had been invited, on behalf of the plaintiff, to put his name to it as a witness, and that he was given or offered a bribe to secure his silence. The cross-examination of this witness was directed to prove hostility between him and the plaintiff's family, and the suggestion made was that from motives of malice he had fabricated the story told in Court. On re-examination the witness was asked whether he had not told his employer *M* the same story the day after he had been approached in reference to the signing of the will. *M* was called, and proved that the impeached witness had told him, a few days after the death of the deceased, substantially the same story. *Held* (affirming the King's Bench Division), that this evidence was properly admitted on the ground that where a witness is charged with a design to misrepresent in consequence of his relation to a party or to the cause, it may be shown that he made a statement similar to his present testimony before that relationship existed. *Held*, by Court of Appeal, that the Court will not look at the transcript of a shorthand writer's note of a judge's charge unless incorporated in the judge's report or adopted by him. *Flanagan v. Fahy*

[K. B. D., App., 361, 377]

PRACTICE—INTERROGATORIES—*Libel—Names of informants.*] In actions for libel, other than actions against newspapers, where the

PRACTICE—continued.

defence is publication on a privileged occasion, an interrogatory asking for the names of the persons on whose information the defendant acted in publishing the words complained of, will in general be permitted, and the defendant ordered to disclose such names. In the absence of circumstances showing that the information asked for is sought for some ulterior purpose, such interrogatory is relevant to the issue of malice, and material to the plaintiff's case. In an action for libel, the defendant having pleaded publication on a privileged occasion, the plaintiff administered, *inter alia*, the following interrogatories, i.e. :—"What information had you when you published the said words which induced you to believe that the allegations in the said words complained of were true, or, what steps (if any) did you take before writing the words to ascertain whether they were true?" and, "From whom did you obtain the information on which you relied in publishing the matters complained of?" The defendant answered the first half of the former interrogatory, but refused to answer the second half, or the latter interrogatory. *Held* by the Court of Appeal, affirming the King's Bench Division (Sir Ignatius J. O'Brien C. diss.), that both these interrogatories were proper; that, as to the former, the language left it in doubt as to whether it was alternative in form, and the defendant was entitled to answer it as he had done; that the latter interrogatory was relevant to the issue of malice and material to the plaintiff's case, and should be answered by the defendant. *Fitzgerald v. Watson* K. B. D.; App. 411, 420

PRACTICE—WRIT OF SUMMONS—Indorsement for Costs—Substituted service.] A writ in a case where service out of the jurisdiction has been allowed, or in a case where an order for substituted service within the jurisdiction is contemplated, indorsed with a claim for £2 10s. for costs, "and such further sum for obtaining the order as may be allowed on taxation," is regular. *O'Brien v. Kavanagh* - - K. B. D. 179

PREVIOUS STATEMENT BY WITNESS

—Admissibility - - 361, 377

See **PRACTICE—EVIDENCE.**

PRINCIPAL AND SURETY—Conditional undertaking in writing to pay debt of another—Promissory note—Guarantee—Indemnity stamp—Release of surety by giving of time to principal—Consent to giving of time—Evidence—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 33—R. S. C. Or. XL, r. 9.] The defendant, amongst other signatories, signed an instrument whereby, in consideration of the plaintiffs advancing to *P.* and *R.* the sum of £140, he, jointly and severally with the other signatories, undertook to pay the plaintiffs the said sum, with the usual rate of bank interest, within

PRINCIPAL AND SURETY—continued.

six months from the date of the instrument. The plaintiffs subsequently advanced to *P.* and *R.* the sum agreed upon, taking from them promissory notes for the payment thereof, which notes were renewed from time to time without the express consent of the defendant. In an action by the plaintiffs against the defendant to recover the sum so advanced to *P.* and *R.* with interest :—*Held*, by the King's Bench Division (Gibson and Kenny JJ.), (1) that the instrument was in its essence contingent and conditional, and was not a promissory note within the provisions of sect. 33 of the Stamp Act, 1891 (54 & 55 Vict. c. 39); (2) that the instrument was a guarantee for future advances, that the findings of the jury amounted to a verdict that the defendant consented to the giving of time to the principal debtors, that the defendant was therefore not thereby released, and that judgment should be entered for the plaintiffs.

Held, by the Court of Appeal (Sir I. J. O'Brien C., Ronan and Molony L.JJ.), affirming the judgment of the King's Bench Division on this point, that the instrument did not require to be stamped as a promissory note under sect. 33 of the Stamp Act, 1891. But *held* (Ronan L.J. dissentiente), reversing the King's Bench Division, that the instrument was a guarantee that the plaintiffs had not discharged the onus of proving consent by the defendant to the giving of time to the principal debtors, and that the defendant was entitled to a direction at the trial. *Provincial Bank of Ireland v. Fisher*

[K. B. D. 521, 538]

PRIVILEGE—EASEMENT - - 1

See **LAND PURCHASE ACTS—PRIVILEGE.**

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See **REVENUE—VALUATION.**

PROMISSORY NOTE—Conditional undertaking to pay debt - - - 521

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PUBLIC AUTHORITIES PROTECTION ACT - - - 288

See **SOLICITOR—BILL OF COSTS.**

PUBLIC HEALTH ACT—Water rate—Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sects. 2, 61, 66, 67, 68, 232, 233, and 279—Cost of construction included in rate—Validity—Appeal—Grounds of appeal—"Stated and specified."] A water rate imposed, under sect. 66 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), on voluntary consumers of water, being in fact the price of the water supplied, necessarily has relation to the cost of production

PUBLIC HEALTH ACT—*continued.*

as well as of maintenance of the water supply. A water rate struck and assessed under this section can include a reasonable amount for discharge of capital expenses of construction. *Mayor of Worcester v. Droitwich Assessment Committee* (2 Ex. D.) discussed and distinguished. The provision in sect. 269 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), requiring the grounds of an appeal against a rate to be "stated and specified" in the notice of intention to appeal, is not a provision as to form only, but is of substance, and no ground is open on appeal unless it is stated in clear and unambiguous language in the notice, and in such a way that the respondent can be made aware of the points upon which the rate is impeached. The respondents, as sanitary authority, struck and assessed a water rate under sect. 66 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52). The rate included a reasonable amount applicable to payment of capital charges and interest incurred in the cost of constructing the water works. The appellants, on whom the rate was assessed, in their notice of appeal stated as grounds of appeal, amongst others, the following:—1, that the rate was made without authority; and, 2, that the rate was made for purposes to which it was not legally applicable, namely, the raising of moneys which were properly raisable by a special poundage rate to be added to poor rate under sects. 232 and 233 of the statute. The Court of Appeal held that the second of these two grounds had not been established, but quashed the rate as being invalid because struck by a resolution not under seal. On case stated, *held*, 1, that the first of the above two grounds was not "stated and specified" as required by sect. 269 of the statute, and that the Court of Appeal had no jurisdiction to hear or determine any objection as to the want of a sealed resolution; 2, that the second of the above grounds was sufficiently stated and specified, and that the rate was not invalid by reason of its including a sum applicable to payment of the capital expenses of construction. *Hanly v. The Sligo Rural District Council* - - - K. B. D. 280

PUBLIC VESSEL—Claim made by foreign power to, evidence to rebut claim not admissible - - - 78
See ADMIRALTY—ARREST.

PUNCTUATION—Construction of Statute 452
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RELEASE of Surety by giving time to Principal - - - 521
See PRINCIPAL AND SURETY.

REQUISITIONED VESSEL—Claim made by foreign Power to, evidence to rebut claim not admissible - - - 78
See ADMIRALTY—ARREST.

RETAINER TO COUNSEL—Taxed in solicitor and client bill under Public Authorities Protection Act, 1893 - 228
See SOLICITOR—BILL OF COSTS.

REVENUE—EXCESS PROFITS DUTY—
"Where the principal business consists in making investments"—*Employers' Liability Insurance—Investment Reserve Fund—Capital—Appropriations from profits to meet depreciation in securities—Allowance—Computation of profits—Finance (No. 2) Act, 1915, Schedule IV, Part I, Rule 8; Part III, Rule 2.*] A company carrying on a fire insurance and employers' liability insurance business is not, for the purposes of the Computation of Excess Profits Duty, a company whose "principal business consists in making investments"; its accumulated profits which have been invested and form a reserve fund cannot be treated as capital employed in the business; and there being no statutory obligation on a limited company to replace capital lost by depreciation in securities, such a company is not entitled to an allowance out of profits for the sums set aside to make good such depreciation. *Irish Catholic Church Property Insurance Company, Ltd., v. The Commissioners of Inland Revenue* - App. 510

REVENUE—INCOME TAX—"Persons residing in the United Kingdom"—*Company registered in Ireland—Managing Director resident in the U.S.A.—Business carried on both in Ireland and abroad—Income Tax Act, 1853 (16 & 17 Vict. c. 34), sect. 2, Schedule D.*] A "one-man" company, whose sole director and manager is ordinarily resident in the United States of America, may be resident in the United Kingdom within sect. 2, Schedule D, of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), and liable to pay income-tax upon the whole of its profits wherever earned. *De Beers Consolidated Mines, Ltd., v. Howe*, [1906] A. C. 455, distinguished. *John Hood & Company, Ltd., v. Magee*

[K. B. D. 34]

REVENUE—VALUATION—Valuation on "revenue" or "profit"—*Electric light undertaking—Method of dealing with machinery not erected or used for the production of motor power—Annual Revision of Rateable Property (Ireland) Amendment Act, 1860 (23 Vict. c. 4).*] Assuming that the "revenue" or "profit" method of assessment can be correctly applied in estimating the valuation of an undertaking such as an electric lighting undertaking, machinery not erected or used for the purpose of producing motor power should be treated as tenants' capital, and not as property in respect of which allowance should be made as property of the hypothetical landlord. *Clones Electric Light and Power Company, Ltd., v. Commissioner of Valuation of Ireland* - - - K. B. D. 56

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- SCOPE OF EMPLOYMENT**—Servant firing at and killing poacher - - - 215
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- SOLICITOR—BILL OF COSTS**—Retainer—Consultation — Taxation — Public Authorities Protection Act, 1893—Solicitor and client—Costs payable by opposite party—Retainer to counsel—Consultation prior to new trial motion—Order 65, rule 65 (28), (29).] A retainer to senior counsel prior to the trial is in a proper case taxable against a party liable to pay costs as between solicitor and client under the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). *Costs of a consultation to settle the defendant's affidavit of discovery of documents were also in the special circumstances allowed as between solicitor and client as against the plaintiff. Costs of a consultation prior to a new trial motion, being taxable as between party and party, were allowed by the Court of Appeal, reversing the King's Bench Division. *Brandon & Co. v. Hanna* (41 Ir. L. T. R. 75) approved. *Newell v. Starkie* (No. 2) - - - - - APP. 228
- STABLE AND CAR-HOUSE**—Ejectment of, under Summary Jurisdiction (Ir.) Act, 1851, s. 15 - - - - - 405
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TENANT'S CAPITAL—Machinery not erected
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 power—Method of valuation of revenue
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 tion of river sewer - - - 207
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TOWN—Existence and extent of—*Order of
 Local Government Board defining boundaries—
 Certiorari inapplicable—Towns Improvement (Ire-
 land) Act, 1854 (17 & 18 Vict. c. 103).]* A town
 sought to adopt the provisions of the Towns
 Improvement (Ireland) Act, 1854 (17 & 18 Vict.
 c. 103). The application was made by electors
 “within the boundaries, hereinafter specified, of
 the town or district of Howth or Sutton, in the
 County of Dublin.” The population of Howth
 town was, according to the census return, only
 1357. The proposed boundaries included not only
 the town and the remainder of the townland of
 Howth, but also other townlands, comprising in
 all 2900 acres, with a population of 3267. By
 sealed order, dated January 17th, 1917, the Local
 Government Board approved of the proposed
 boundaries, and a statutory meeting was held on
 February 17th, 1917, at which a resolution to
 adopt the Act was carried by a large majority. On
 March 22nd, 1917, the Local Government Board
 issued their sealed order approving of the adoption
 of the Act by the “town of Howth,” bounded as
 in their order of January 17th, 1917. On
 March 28th, 1917, the North Dublin Rural Dis-
 trict Council obtained a conditional order of
 certiorari to quash the two sealed orders. The
 King's Bench Division discharged the conditional
 order of certiorari on the ground that the Local
 Government Board order finally approving of the
 adoption of the Act was made final and conclusive
 proof for all purposes by sect. 15 of the Act.
Held, by the Court of Appeal, Sir Ignatius J.
 O'Brien C. and Ronan L.J. (Molony L.J. dissent-
 ing), that the refusal of the King's Bench Division
 to grant a certiorari was right. Per Sir Ignatius J.
 O'Brien C., on the ground that the householders
 of the town in sect. 4 are not necessarily the
 householders of some area that is popularly called
 a town, but are householders within the boundaries
 which have been marked out upon a map to be

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approved or disapproved of by the Local Government Board; and inasmuch as a determination of the question whether sect. 15 of the Act of 1854 took away certiorari was not necessary to the decision of the Court, he declined to express any opinion on this point. *Per Ronan L.J.*, that inasmuch as the order of the Local Government Board of March 22nd, 1917, could have had no operation until approved of under sect. 15, and therefore did not per se impose liability or alter rights, it was not subject to certiorari. *R. (North Dublin Rural District Council) v. Local Government Board* - - - **APP. 158**

TRADES DISPUTE—Peaceful Picketing—
Trades Disputes Act, 1906 (6 Edw. 7, c. 47), s. 2—
Meaning of the words "at or near"—*Right to enter on private property*—*Onus of proof*—*Motives unconnected with dispute—Justices—Conviction.*]

An unlawful entry on another's premises cannot be justified under sect. 2, sub-s. 1, of the *Trades Disputes Act*. (*Per Sir James Campbell C.J. and Kenny J.*) Acts done during an existing trade dispute may in reality be dictated by political or personal motives so as to lose the protection of that section. *Larkin v. Belfast Harbour Commissioners*, [1908] 2 I. R. 214, followed. *M'Cusker v. Smith* - - - **K. B. D. 432**

TRIVIAL OFFENCE—Military evolutions—
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VALUATION—Machinery not erected or used for the production of motor power 56
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1. WAR—EMERGENCY LEGISLATION—
Execution for costs—Leave to issue—Action on pre-war contract—Judgment for defendants—
"Sum of money to which this sub-section applies"—*Courts (Emergency Powers) Act*, 1914 (4 & 5 Geo. 5, c. 78), sect. 1, sub-s. 1 (a); *Courts (Emergency Powers) Act*, 1917 (7 & 8 Geo. 5, c. 25), sect. 6.]
 In an action on a pre-war contract the defendants succeeded, and were awarded judgment for their costs. *Held*, that the *Courts (Emergency Powers) Act*, 1914, applied to a judgment for costs only, and that leave to proceed to execution was necessary. *Dobb v. Dobb* ([1914] 1 Ch. 443) followed. *Gordon & Co. v. Kirk & Co.*

[APP. 455]

2. WAR—EMERGENCY LEGISLATION—
Food Control—Bacon—Defence of the Realm Regulations—Bacon, Ham, and Lard (Provisional Prices) Order, 1917 (1917: No. 1180)—*Article 13—"Accurate Records."*] An invoice showing

WAR—continued.

the quantity of bacon bought by the retailer, a railway receipt for the carriage of the bacon bought, and a list of prices of various "cuts" of bacon hung up in the retailer's shop are not "accurate records" within the meaning of article 13 of the *Bacon, Ham, and Lard (Provisional Prices) Order*, 1917. No. 1180). *Rex (O'Shea) v. O'Neill* - - - **K. B. D. 395**

3. WAR—EMERGENCY LEGISLATION—

Food Control—Bread—Bread Order, 1917 (1917. No. 189)—*Defence of the Realm Regulations—Selling Bread under weight—Even number of pounds weight—Weighing bread within thirty hours of completion of baking.*] Article 7 of the *Bread Order*, 1917 (1917. No. 189), is an absolute prohibition against the sale of a loaf which does not weigh an even pound or even number of pounds weight. Article 7 provides that bread may be weighed at any time within thirty hours after the completion of the baking. Where a loaf of bread is weighed at mid-day on the day on which it is delivered, *prima facie* the weighing is done within thirty hours of the completion of the baking, and the onus of proving the contrary is on the defendant. *Rex (Taylour) v. McDonnell* [K. B. D. 398**]**

4. WAR—EMERGENCY LEGISLATION—

Food Control—Bread—Maximum price of—
Defence of the Realm Regulation 2 F.—Flour and Bread (Prices) Order, 1917—*Reasonable additional charge for making delivery—Delivery—Bread sold from a travelling van.*] Under clause 5 (b) of the *Flour and Bread (Prices) Order*, 1917, which allows a reasonable charge for making delivery in addition to the maximum price of bread fixed by clause 5 (a), delivery in respect of which such additional charge may be made must be delivery other than and in addition to the act of the delivery of the bread to a purchaser across the counter or on a sale from a travelling van. *Wallace v. Burrows*

[K. B. D. 127]

5. WAR—EMERGENCY LEGISLATION—

Food Control—Butter—Butter (Maximum Prices) Order, 1917 (1917. No. 913)—*Defence of the Realm Regulations—Butter (Maximum Prices) (Amendment) Order*, 1917 (1917. No. 1110)—*Selling by retail—Retail price exceeding actual cost by more than 2½d.—Actual cost—Onus of proof.*] Under the *Butter (Maximum Prices) Order*, 1917 (1917. No. 913), the maximum retail price of butter is fixed at a price not exceeding by more than 2½d. the "actual cost" of the butter to the retailer. Such "actual cost" is the net price paid by the retailer (not exceeding the maximum wholesale or first-hand prices fixed by the order), plus money actually paid for transport not included

WAR—*continued.*

in that price. Under article 10 of the Butter (Maximum Prices) (Amendment) Order, 1917 (1917. No. 1110), it is provided that a person, on buying butter, may rely on any written statement made by his vendor as to the money or moneys paid or payable by such vendor in relation to the butter sold. A retailer in order to show that his retail price does not exceed by more than $2\frac{1}{2}d.$ the actual cost, and to fully protect himself, should obtain a written statement from his vendor as to the money or moneys paid or payable by the vendor in relation to the butter sold, and must ascertain whether the price charged by the vendor, having regard to such statement, does not exceed the maximum price chargeable by that vendor to him. *Rex (M'Entee) v. Smyth* - K. B. D. 402

WAR — **EMERGENCY LEGISLATION** —

See LICENCE, CHARGE ON.

WATER RATE—Costs of construction included in rate, validity - - - 280

See PUBLIC HEALTH ACTS.

WILL—**EXECUTION**—Unattested Signature—Subsequent Acknowledgment.] A testatrix signed her will, but her signature was not then attested. Subsequently she signed it again in the presence of two witnesses, who signed above her later signature, but before she had written it. The words "signed again in the presence of," etc., appeared above the witnesses' signatures. *Held*, a good acknowledgment of the earlier signature, and that the will should be admitted to probate. *In the goods of Pattison Henderson v. Priestman*.

[Dodd J. 90

WORDS—"Accurate Records"—Food Control.

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See WAR—**EMERGENCY LEGISLATION**. 2.

— "At or near" - - - 432

See TRADES DISPUTE.

— Extenuating Circumstances — Failure of Executive to prosecute persons in pari delicto with accused - - - 63

See JUSTICES JURISDICTION (PETTY SESSIONS). 1.

— "House," stable and car-house - - - 405

See JUSTICES—JURISDICTION (PETTY SESSIONS). 1.

— "Inmate of the Workhouse" - - - 181

See LOCAL GOVERNMENT—MEDICAL OR SURGICAL RELIEF.

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— "Purposes of the employer's trade or business" - - - 563

See WORKMEN'S COMPENSATION. 2.

— "Reasonable and proper to be executed under the control of the Court" - 570

See BANKRUPTCY—COMPOSITION.

— "Stated and Specified," grounds of appeal.

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See PUBLIC HEALTH ACTS.

— "Sum of money to which this sub-section applies" - - - 455

See WAR EMERGENCY LEGISLATION. 1.

— "Wilfully" - - - 452

See NATIONAL INSURANCE.

1. WORKMEN'S COMPENSATION—Accident arising out of employment—*Special risk*—*Compensation*—*Test of liability of employer*.] The applicant was employed by the War Department as a weighing supervisor at 33s. per week, which included an allowance for maintaining and repairing a bicycle owned and used by her in riding to and from her place of employment. If she did not use her bicycle, her cycling allowance would be stopped. Her duty was to check the weights of bales of hay purchased by the military at outlying farms, and to furnish "returns" to the baling supervisor each evening or the following morning. On the occasion of the accident she was returning from a farm on her bicycle with her book when she collided with another cyclist, was thrown from her bicycle, and her collar-bone broken. The County Court Judge found that the accident arose "in the course of her employment," but not "out of the employment." *Held*, following *Dennis v. White*, [1917] A. C. 479, that the accident arose "out of the employment." *Heffernan v. The Secretary for War* - - - APP. 467

2. WORKMEN'S COMPENSATION—Casual employment—*Fatal accident*—*Repairing a farmer's residence*—"Purposes of the employer's trade or business"—*Workmen's Compensation Act*, 1906 (6 Edw. 7, c. 58), sect. 13—*Admission of liability to deceased workman—Estoppel*.] A casual labourer engaged to repair the residence of a farmer is not a workman employed "for the purposes of the employer's trade or business." An admission by an employer of his liability under the Workmen's Compensation Act to a workman who subsequently dies from the effects of injuries received in the employment, does not operate as an estoppel in an application by the dependants of the deceased for compensation under the Act. *Manton v. Cantwell* - - - APP. 563

